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The Law of Federal Labor-Management Relations



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**Administrative and Civil Law Department
The Judge Advocate General's School
United States Army
Charlottesville, Virginia**

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ATTENTION OF

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THE JUDGE ADVOCATE GENERAL'S SCHOOL
CHARLOTTESVILLE, VIRGINIA 22903-1781



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16 May 1996

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6 Encls
as

Charles J. Strong
CHARLES J. STRONG
DOD, GS-5
Editorial Assistant

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PREFACE

This compilation of cases and materials on labor-management relations is designed to provide primary source materials for students in the Graduate Course and those attending Continuing Legal Education courses in Administrative and Civil Law at The Judge Advocate General's School, U.S. Army.

The casebook contains seven chapters, the first providing an introduction to the practice of Federal sector labor law, and the remaining six chapters dealing with a major area of Federal sector labor law. Chapter 2 addresses the process by which a union becomes an exclusive representative of a group of employees. Chapter 3 deals with collective bargaining. This includes matters which are not negotiable, matters which may be negotiated at management's option, and matters management must negotiate. Chapter 4 deals with the procedures to be followed when management and the union cannot agree on a matter which is negotiable (impasse procedures). Chapter 5 deals with unfair labor practices. Chapter 6 deals with grievances and arbitration. Chapter 7 addresses judicial review.

This casebook does not purport to promulgate Department of the Army policy nor to be in any sense directory. The organization and development of legal materials are the work products of the members of The Judge Advocate General's School faculty and do not necessarily reflect the views of The Judge Advocate General or any governmental agency. The words "he," "him," and "his" when used in this publication represent both the masculine and feminine genders unless otherwise specifically stated.

THE LAW OF FEDERAL LABOR-MANAGEMENT RELATIONS

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CHAPTER 1

INTRODUCTION

1-1. Federal Sector Labor Management Relations Prior to 1978.

Federal Service labor-management relations had evolved under Executive Orders since 1962, when President Kennedy issued Executive Order 10988, "Employee-Management Cooperation in the Federal Service." The Order specifically recognized the right of Federal employees to join, or to refrain from joining, employee organizations. Among other provisions, the Order established procedures for the granting of recognition to organizations of Federal employees, defined the scope of consultations and negotiations with the employee organizations, and authorized the use of advisory arbitration of grievances.

In 1969, a review of the program indicated that the policies of Executive Order 10988 had brought about more democratic management of the workforce and better employee-management cooperation; that negotiation and consultation had produced improvements in a number of personnel policies and working conditions; and that union representation of employees in exclusive bargaining units had expanded greatly. However, significant changes in the program were recommended to meet the conditions produced by the increased size and scope of labor-management relations. These recommendations led to the issuance in 1969 of Executive Order 11491, "Labor-Management Relations in the Federal Service," with the private sector as the model.

Executive Order 11491 retained the basic principles and objectives underlying Executive Order 10988, and added a number of fundamental changes in the overall labor-management relations structure. The Order established the Federal Labor Relations Council as the central authority to administer the program. Specifically, the Council was established to oversee the entire Federal service labor-management relations program; to make definitive interpretations and rulings on the provisions of the Order; to decide major policy issues; to entertain, at its discretion, appeals from decisions of the Assistant Secretary of Labor for Labor-Management Relations; to resolve appeals from negotiability decisions made by agency heads; to act upon exceptions to arbitration awards; and periodically to report to the President the state of the program and to make recommendations for its improvements. The Council was composed of the Chairman of the Civil Service Commission, the Secretary of Labor, and the Director of the Office of Management and Budget.

Several other third-party processes were instituted at the same time to assist in the resolution of labor-management disputes. The Assistant Secretary of Labor for Labor-Management Relations was empowered to decide questions principally pertaining to representation cases and unfair labor practice complaints. The Federal Mediation and Conciliation Service was authorized to extend its mediation assistance services to parties in Federal labor-management negotiations. The Federal Service

Impasses Panel was established as an agency within the Council to provide additional assistance when voluntary arrangements, including the services of the Federal Mediation and Conciliation Service or other third-party mediation, failed to resolve a negotiation impasse. In addition, the Order authorized the use of binding arbitration of employees' grievances and of disputes over the interpretation or application of collective bargaining agreements.

Under Executive Order 11491, the Federal Service labor-management relations continued to expand. By 1977, 58 percent of nonpostal Federal employees were in units of exclusive recognition, and collective bargaining agreements had been negotiated covering 89 percent of those employees. As the program evolved, Executive Order 11491 was reviewed and amendments or clarifications of the Order were made on several occasions. The 1977 Task Force of President Carter's Federal Personnel Management Project identified a variety of problems, particularly relating to structure and organization, which remained unresolved in the Federal Service labor-management relations program established by Executive Order. Recommendations developed by the task force formed a basis for both parts of the President's reform program--a reorganization plan and proposed substantive legislation which became the Civil Service Reform Act of 1978 (CSRA). The portion fo the CSRA dealing with federal labor relations was codified at 5 U.S.C. § 7101-7135, as the Federal Service Labor-Management Relations Statute (FSLMRS). The Federal Labor Relations Authority refers to the FSLMRS as "The Statute".

The CSRA cast into law all provisions of the Federal labor relations program which had operated under Executive Order since 1962. These provisions are intended to assure agencies the rights necessary to manage Government operations efficiently and effectively, while protecting the basic rights of employees and their union representatives.

The Preamble to the Statute states the policy towards labor unions representing Federal employees. It states at section 7101:

- (a) **The Congress finds that--**
 - (1) **experience in both private and public employment indicates that statutory protection of the right of employees to organize, bargain collectively, and participate through labor organizations of their own choosing in decisions which affect them--**
 - (A) **safeguards the public interest,**
 - (B) **contributes to the effective conduct of public business, and**
 - (C) **facilitates and encourages the amicable settlement of disputes between employees and their employers involving conditions of employment; and**

(2) the public interest demands the highest standards of employee performance and the continued development and implementation of modern and progressive work practices to facilitate and improve employee performance and the efficient accomplishment of the operations of the Government.

Therefore, labor organizations and collective bargaining in the civil service are in the public interest.

This provides the basic framework the labor counselor needs in resolving labor law problems. The above section is especially helpful when explaining to reluctant staff members why a certain course of action can or cannot be done, i.e., that "management is required by congressional mandate to cooperate with labor organizations."

1-2. Federal Labor-Management Relations in the Department of the Army.

Since 1962, many Federal employees have elected to have unions represent them. The Office of Personnel Management has reported that, as of January 1991, 60% (1,250,777) of all non-postal Federal employees were represented by labor organizations. Exclusive recognitions covered 93 percent of wage system employees and 53 percent of the general schedule employees. These figures are especially impressive when you consider that many Federal employees, such as supervisors and management officials, are not eligible to be represented by labor organizations.

In the Department of the Army union gains have also been impressive. By January 1991, 205,820 Army civilian employees were represented by unions, maintaining DA's status as the Executive Branch agency with the highest number of employees represented by unions. These figures include non-appropriated fund employees, who may also be represented by an exclusive representative. See chapter 13, AR 215-3.

Recognizing the Army's need for legal advice in labor-management relations, The Judge Advocate General and the Director of Civilian Personnel in July 1974 undertook a program for improving communication and coordination between the legal and personnel staffs at all levels of command. As part of this program, at least one lawyer at each Army installation is designated to provide legal advice on labor relations to the Civilian Personnel Officer (Appendix A). The labor counselor program received added emphasis from The Judge Advocate General in 1982 (Appendix B) and 1985 (Appendix C).

This text is intended primarily to be used in conjunction with classes designed to give DOD lawyers the background they need to serve as labor advisors to commanders and Civilian Personnel Offices. It is structured to provide a desk reference for lawyers with labor law issues in the field.

To practice Federal sector labor law, a lawyer must have additional reference materials. As a minimum, a lawyer must have the rules and decisions of the various program authorities which govern labor law in the Federal sector. The Code of Federal Regulations contains substantive and procedural regulations issued by the Federal Labor Relations Authority. The Government Printing Office publishes all the decisions of the Federal Labor Relations Authority and the Federal Service Impasses Panel. These are available on WESTLAW and LEXIS and on the GPO Web Site. The Bureau of National Affairs has published these rules and decisions in its Government Employee Relations Report as has the Labor Relations Press in the Federal Labor Relations Reporter. Information Handling Services also publishes and indexes these decisions in a CD-ROM service.

In addition to these reference materials, a lawyer must also refer to private sector labor law, as many aspects of Federal sector labor law are analogous to private sector labor law.

The Office of Personnel Management operates a computerized data retrieval service called Labor Agreement Information Retrieval System (LAIRS). A variety of statistical and textual information is available for a "search" fee, with requests forwarded from local activities through major commands.

1-3. Federal Labor Relations Authority.

The Federal Labor Relations Authority (FLRA or Authority) was established as an independent agency in the executive branch by Reorganization Plan No. 2 of 1978. The Authority administers Title VII, "Federal Service Labor-Management Relations," of the Civil Service Reform Act of 1978, which became effective 11 January 1979. As stated therein, the Authority provides leadership in establishing policies and guidance relating to Federal service labor-management relations and ensures compliance with the statutory rights and obligations of Federal employees, labor organizations which represent such employees, and Federal agencies under Title VII. It also acts as an appellate body for lower level administrative rulings.

The Authority is composed of three full-time members, not more than two of whom may be adherents of the same political party, appointed by the President, by and with the advice and consent of the Senate. Members may be removed by the President upon notice and hearing, only for inefficiency, neglect of duty, or malfeasance in office. One member is designated by the President to serve as Chairman of the Authority. Each member is appointed for a term of five years.

The Authority provides leadership in establishing policies and guidance relating to matters under Title VII of the Civil Service Reform Act and is responsible for carrying out its purpose. Specifically, the Authority is empowered to:

- (A) determine the appropriateness of units for labor organization representation;
- (B) supervise or conduct elections to determine whether a labor organization has been selected as an exclusive representative by a majority of the employees voting in an appropriate unit and otherwise administer the provisions relating to according of exclusive recognition to labor organizations.
- (C) prescribe criteria and resolve issues relating to the granting of national consultation rights;
- (D) prescribe criteria and resolve issues relating to determining compelling need for agency rules or regulations;
- (E) resolve issues relating to the duty to bargain in good faith;
- (F) prescribe criteria relating to the granting of consultation rights with respect to conditions of employment;
- (G) conduct hearings and resolve complaints of unfair labor practices;
- (H) resolve exceptions to arbitrators' awards; and
- (I) take such other actions as are necessary and appropriate to effectively administer the provisions of Title VII of the Civil Service Reform Act of 1978.

To assist in the proper performance of its functions, the Authority has appointed Administrative Law Judges to hear unfair labor practice cases prosecuted by the General Counsel. Decisions of Administrative Law Judges are transmitted to the Authority, which may affirm or reverse, in whole or in part, or make such other disposition as the Authority deems appropriate.

1-4. The General Counsel of the Federal Labor Relations Authority.

The General Counsel of the Authority is appointed by the President, by and with the advice and consent of the Senate, for a term of five years. The General Counsel is primarily responsible for supervision of the seven Regional Offices. In ULP cases the regional staffs serve as the General Counsel's field representatives. Each Regional Office is headed by a Regional Director, with a Regional Attorney who works closely with him or her as ULP cases develop. Each region also has a supervisory attorney or supervisory labor relations specialist who supervises the investigation of the ULP's and the processing of representation cases. After investigation, the Regional Office decides if these issues brought to it by a union or management have merit and will be pursued before the Authority. This decision of the Regional Office is appealable to the General

Counsel. The remainder of the professional regional staff is roughly composed of half attorneys and half labor relations specialists. All staff members may function as ULP investigators but only the attorneys serve as prosecutors in ULP hearings.

1-5. Federal Mediation and Conciliation Service.

The Federal Mediation and Conciliation Service (FMCS) is an independent agency of the Federal government whose purpose is to resolve negotiation impasses. A negotiation impasse occurs when the parties agree that a matter is negotiable, but cannot agree to either side's proposal. Rather than using the coercive acts of a strike or a lockout (both of which are impermissible in the Federal sector), the services of the FMCS are used to try to resolve the dispute. The FMCS consists of a Director located in Washington, D.C., and commissioners located throughout the country. A mediator meets with the parties and attempts to resolve the deadlock by making recommendations and offering assistance to open communications. The mediator has no authority to impose a solution.

1-6. Federal Service Impasses Panel.

The Federal Service Impasses Panel (FSIP) is an entity within the Authority, the function of which is to provide assistance in resolving negotiation impasses between agencies and exclusive representatives. The Panel is composed of a chairman and six other members, who are appointed by the President, from among individuals who are familiar with Government operations and knowledgeable in labor-management relations. The Panel considers negotiation impasses after third-party mediation fails. The Panel will attempt to get the parties to resolve the dispute themselves by making recommendations or, as a last resort, will impose a solution. Resort to the Panel must be preceded by attempted resolution by the FMCS.

1-7. Jurisdiction.

a. Scope of the CSRA.

Section 7101(b) of the Civil Service Reform Act (CSRA) provides:

It is the purpose of this chapter to prescribe certain rights and obligations of the employees of the Federal Government and to establish procedures which are designed to meet the special requirements and needs of the Government. The provisions of this chapter should be interpreted in a manner consistent with the requirement of an effective and efficient Government.

Thus, the CSRA covers only "employees of the Federal Government." Employees are defined in section 7103(a)(2) as:

"employee" means an individual--

- (A) employed in an agency; or
- (B) whose employment in an agency has ceased because of any unfair labor practice under section 7116 of this title and who has not obtained any other regular and substantially equivalent employment, as determined under regulations prescribed by the Federal Labor Relations Authority;

but does not include--

- (i) an alien or noncitizen of the United States who occupies a position outside the United States [except for agency operations in Republic of Panama - see 22 U.S.C.A. 3701(a)(1)];
- (ii) a member of the uniformed services;
- (iii) a supervisor or a management official;
- (iv) an officer or employee in the Foreign Service of the United States employed in the Department of State, the International Communication Agency, the United States International Development Cooperation Agency, the Department of Agriculture, or the Department of Commerce; or
- (v) any person who participates in a strike in violation of section 7311 of this title;

Generally, an employee is an individual "employed in an agency." What is an agency? That is defined in section 7103(a)(3):

(3) 'agency' means an Executive agency (including a nonappropriated fund instrumentality described in section 2105(c) of this title and the Veterans' Canteen Service, Department of Veterans Affairs), the Library of Congress, and the Government Printing Office, but does not include-

- (A) the General Accounting Office;
- (B) the Federal Bureau of Investigation;
- (C) the Central Intelligence Agency;
- (D) the National Security Agency;
- (E) the Tennessee Valley Authority;

- (F) the Federal Labor Relations Authority;
- (G) the Federal Service Impasses Panel; or
- (H) the Central Imagery Office; . . .

This section of the CSRA and 5 U.S.C. § 104 and 105 exclude the U.S. Postal Service from the jurisdiction of the Authority. It is governed by the National Labor Relations Act. See United States Postal Service, Dallas, Texas and National Association of Letter Carriers, 8 FLRA 386 (1982).

In the following case, the union filed a petition asking the Regional Director of the FLRA to conduct a secret ballot election so that the cafeteria workers could vote for or against union representation. Fort Bragg opposed the election, arguing that the cafeteria workers were not Federal employees. The Authority held that the facility's Cafeteria Fund was a private organization rather than an agency within the meaning of 5 U.S.C. § 7103(a)(3). Although the Commanding General controlled appointments to the Fund Council through the School Board, he did not exercise control over day-to-day operations.

**FORT BRAGG SCHOOLS SYSTEM,
FORT BRAGG, NORTH CAROLINA**

3 FLRA 99 (1981)

(Extract)

Upon a petition duly filed with the Federal Labor Relations Authority under section 7111(b)(2) of the Federal Service Labor-Management Relations Statute, 5 U.S.C. §§ 7101-7135, a hearing was held before a hearing officer of the Authority. The Authority has reviewed the hearing officer's rulings made at the hearing and finds that they are free from prejudicial error. The rulings are hereby affirmed.

Upon the entire record in this case, the Authority finds:

The Petitioner filed an amended petition seeking exclusive recognition as the certified representative of all employees of Fort Bragg Schools Cafeteria Fund (Fund).... Petitioner argues that the Fort Bragg Schools System (System) is the Activity because the Fund is an instrumentality of the Army at Fort Bragg, and not a separate and distinct entity as contended by the Activity. The Activity asserts the Fund is not an "agency" within the meaning of section 7103(a)(3), the employees of the Fund are not "employees" within the meaning of section 7103(a)(2) of the Statute and,

therefore, the Fund is not subject to the Authority's jurisdiction. The sole issue herein is whether the Fund is an "agency" within the meaning of the Statute, and therefore subject to the jurisdiction of the Authority.

The Fund is a private organization that provides noonday meals to students and faculty for the Fort Bragg Schools System. The Fund employs approximately 36 employees at seven schools. Approximately 98% of the students are either military dependents, children of civilian base residents, or non-military related dependents of military households.

Revenue is derived primarily from cash receipts for lunches and milk sold in the school cafeterias and is expended for salaries, supplies, and other expenses necessary for the cafeteria operation. The Fund also participates in the reimbursement plan of the U.S. Department of Agriculture surplus food commodities program via the State of North Carolina.

The Fund employees were nonappropriated fund (NAF) employees until 1976 when the cafeteria operation's status was changed to a "Type 3" private organization under Army Regulation 210-1, with the approval of the Commanding General. Although the Commanding General has the right to revoke his approval of the Fund as a private organization, he does not have control over its day-to-day operations. Such classification is defined in Army Regulation 210-1 as an independent private organization that is "controlled locally by a common interest group with no formal connection with outside organizations." The status was changed at the request of North Carolina State officials for the stated reason that it was inappropriate for the school system to be taking monies (lunch payments) from the cafeteria operation and paying it to the central post for support services. The State directed that the cafeteria operation be operated in a manner comparable to other systems in North Carolina. At the time of the change, employees had the option to resign and seek outside employment, be assigned to another NAF unit, or be hired by the new private organization, the Fund. None of the employees sought other NAF jobs. All of them sought positions with, and were hired by the Fund. As a result of the change, employees were refunded their "NAF" retirement benefits because the Fund does not have a retirement plan.

A representational certificate had been granted to the National Association of Government Employees (NAGE) in 1973 for all NAF employees at Fort Bragg. NAGE did not challenge the loss of the Fund employees at the time of the creation of the Fund, nor did it intervene in the instant proceeding.

The Fund's constitution and employee contracts are the only written documents governing the Fund's operations. Article II(f) of the constitution

states that the "organization will be self-sustaining and receive no support assistance or facilities from the Army or from nonappropriated fund instrumentalities . . ." Article V states that the Fort Bragg School Board will constitute the officers of the Fund and will serve as the Fund Council (Council). Presently, the School Board members are appointed by the Commanding General. Article V, section II requires that the Superintendent of Schools be appointed Custodian of the Fund. Membership in the Fund is voluntary and open to all parents of dependent children enrolled in the System and all school employees. The constitution also includes employee policies and regulations.

The School Food Services Supervisor is in charge of managing the food operations at the seven schools and reports to the Assistant Superintendent for Business, who reports directly to the Superintendent. Although the Superintendent, Assistant Superintendent, and Food Services Supervisor are appropriated fund employees and receive government checks, the employees receive nongovernment checks against the Fund's account, endorsed by the Superintendent. The Superintendent approves leave but employees have a right of appeal to the Council. There is no interchange of assignments between the employees of the System and those of the Fund, and no common first level supervision.

Based on the foregoing, it is concluded that the Fund is not an "agency" as defined in section 7103(a)(3) of the Statute. That is, the Fund is not an Executive agency, or a nonappropriated fund instrumentality of the U.S. Army. As to whether it continues to be an NAF instrumentality of the U.S. Army, as set forth above, the record reveals that the Fund was established and exists as a private organization in accordance with Army regulations and in response to a legitimate purpose. Further, the Fund's employees, in contrast to other NAF employees, do not have a retirement plan, and are now covered by social security. Although the Commanding General controls appointments to the Fund Council via the School Board, he does not exercise control over its day-to-day operations, or the wages, hours and working conditions of the Fund's employees.

Under these circumstances, it is concluded that the Fund is no longer a NAF instrumentality and therefore does not come within the definition of "agency" under section 7103(a)(3) of the Statute. Thus, the employees are not "employees" within the meaning of section 7103(a)(2). Accordingly, it shall be ordered that the petition herein be dismissed on jurisdictional grounds.

ORDER

IT IS HEREBY ORDERED that the petition in Case No. 4-RO-30 be, and it hereby is, dismissed.

b. President's Authority to Exclude and Suspend Employees from Coverage.

The statute, by its terms, has limited applicability. In addition, the President may exclude any agency or subdivision thereof from coverage under the statute for national security grounds. (5 U.S.C. § 7103(b)) President Carter excluded certain organizations by Presidential Executive Order 12171 (44 Fed. Reg. 66565 (1979)). See Naval Telecommunications Center, 6 FLRA 498 (1981) for a discussion of this provision.

Executive Order 12171 has been amended at least eight times by various Presidents. In A.F.G.E. v. Reagan, 870 F.2d 723 (D.C. Cir. 1989) the court upheld the authority of the President to issue the Executive Orders excluding certain agencies or subdivisions from coverage of the CSRA.

In Ward Circle Naval Telecommunications Center, 6 FLRA 498 (1981), the Authority held that it was without jurisdiction to process a representation petition for a four-person unit of employees engaged in the operation, maintenance and repair of "off line" and "on line" cryptographic equipment because the activity was excluded from the coverage of CSRA by EO 12171. In Criminal Enforcement Division, Bureau of Alcohol, Tobacco and Firearms, 3 FLRA 31 (1980), the Authority held that it had no jurisdiction over a Representational Petition (RO) case involving a proposed unit of all professional and nonprofessional employees of the activity because the activity was excluded from the coverage of CSRA by EO 12171. In Los Alamos Area Office, Department of Energy, 2 FLRA 916 (1980), the Authority dismissed a negotiability petition on the ground the subdivision of the agency was excluded from the coverage of CSRA by EO 11271.

In addition to his authority to exclude such organizations, the President may also suspend, under 5 U.S.C. § 7103(b)(2), the application of CSRA to any "agency, installation, or activity located outside the 50 States and the District of Columbia," when such suspension is in the interest of national security.

On November 4, 1982, President Reagan signed EO 12391. This EO gives the Secretary of Defense the authority to suspend collective bargaining within DOD overseas when union proposals would "substantially impair" the implementation of status of forces agreements (SOFA) overseas with host nations. The EO grew out of a dispute between NFFE and Eighth U.S. Army, Korea concerning union proposals to lift ration control purchase limits in the Army commissary store, and to waive certain registration requirements for employee's privately owned vehicles. See NFFE and

Eighth U.S. Army Korea, 4 FLRA 68 (1980), and Department of Defense v. FLRA and NFFE, 685 F.2d 641 (D.C. Cir. 1982).

The President's authority to exclude agencies or subdivisions is separate from the authority to exclude individuals or groups of employees from a bargaining unit based on the employee's involvement with national security (5 U.S.C. § 7112(b)(6)). See Defense Mapping Agency and AFGE, 13 FLRA 128 (1983).

CHAPTER 2

THE REPRESENTATION PROCESS

2-1. Introduction.

a. Recognition. Under the Federal Service Labor-Management Relations Statute, (5 U.S.C. §§ 7101 - 7135) (FSLMRS) labor organizations may represent Federal employees in four situations:

1. exclusive recognition §§ 7103(a)(16) and 7111;
2. national consultation rights § 7113;
3. consultation rights on government-wide rules or regulations § 7117(d); and
4. dues allotment recognition § 7115(c).

The first two varieties of recognition are carried over from EO 11491; the latter two were created by FSLMRS. Because most labor counselors do not become involved with the latter three, this text will merely define them. It will address in detail the exclusive recognition form of representation.

b. National consultation rights. A union accorded NCR by an agency or a primary national subdivision of an agency is entitled (1) to be informed of any substantive change in conditions of employment proposed by the agency, (2) to be permitted a reasonable amount of time to present its views and recommendations regarding the proposed changes, (3) to have its views and recommendations considered by the agency before the agency acts, and (4) to receive from the agency a written statement of the reasons for the action taken. 5 U.S.C. § 7113(b). To qualify, the union must hold exclusive recognition either for at least 10% or for 3,500 of the civilian employees of the agency or the primary national subdivision (PNS), provided that the union does not already hold national exclusive recognition. 5 C.F.R. § 2426.1

c. Consultation rights on government-wide rules or regulations. Under this form of recognition, the rights of a union accorded consultation rights are comparable to those under national consultation rights. The chief difference is that only agencies issuing government-wide rules and regulations can grant such recognition. 5 U.S.C. § 7117(d)(1). To qualify, the union must hold exclusive recognition for at least 3,500 employees, government-wide. 5 C.F.R. § 2426.11(a)(2).

d. Dues allotment recognition. A union qualifies for dues allotment recognition if it can show that at least 10% of the employees in an appropriate unit for

which no union holds exclusive recognition are members of the union. 5 U.S.C. § 7115(c)(1). A union accorded dues allotment recognition can negotiate on only one matter: the withholding of union dues from the pay of the employees who are members of the union. The dues withholding and official time provisions of 5 U.S.C. §§ 7115(a) and 7131(a), applicable only to unions holding exclusive recognition, do not apply to a union with only dues allotment recognition.

e. **Exclusive Recognition.** The most common type of recognition for the installation labor counselor is that of exclusive representation of a labor organization. The Federal Labor Relations Authority and its General Counsel, through the Regional Director, supervise the process by which labor organizations obtain exclusive representation.

To obtain "exclusive recognition" a labor organization must receive a majority of the valid votes cast in a secret ballot election held among employees in an appropriate unit. A labor organization may "force" the required secret ballot election by filing a petition seeking an election with the appropriate Regional Director. The Regional Director will review the petition to insure that it is timely filed, that there is the requisite showing of interest, and that the bargaining unit is appropriate. If it satisfies the above requirements, the Regional Director will schedule a secret ballot election. The Authority certifies a union if the union receives the requisite number of employee votes.

A union accorded exclusive recognition is entitled to a number of rights and benefits to include: the right to negotiate the conditions of employment of the employees it represents (5 U.S.C. §§ 7114 and 7117); the right to be given an opportunity to be represented at "formal discussions" and "investigatory examinations" (5 U.S.C. § 77114(a)(2)); the right to receive official time to negotiate collective bargaining agreements (5 U.S.C. § 7131(a)); and the right to receive dues allotments at no cost to the union (5 U.S.C. § 7115(a)). The union also has a number of obligations, including a general duty to represent the interests of all bargaining unit employees without regard to union membership (5 U.S.C. § 7114(a)(1)).

2-2. Solicitation of Employees.

A union must receive a majority of the valid votes cast in the representation election, before it is certified as the exclusive representative. To obtain this support, it must communicate with the employees. Labor union organizers can communicate with employees off the installation but it is difficult to assemble them off-post and during off-duty hours. They prefer to contact employees at their places of employment. But to allow such may disrupt work. The labor counselor may be expected to advise commanders as to the right of employee and nonemployee union organizers to solicit employees on the installation. The Federal sector has borrowed its solicitation rules from the private sector. The following materials address these rules.

a. Solicitation by nonemployees.

The cases below discuss the rules management may use in restricting nonemployee labor organizers from entry on the installation. These are normally persons paid by the national office. As a general rule, management need not allow professional labor organizers on the activity premises to solicit support. There are exceptions such as when the organizers show they cannot reasonably communicate with the proposed bargaining unit employees on a direct basis outside the activities premises (employee inaccessibility). A second exception is when management decides to allow one union to use its services and facilities. It would then be required to furnish equal services and facilities to other unions that have equivalent status to the first union.

The two cases excerpted below will discuss the above points. The first case deals with the exception for organizers who cannot reasonably communicate with the proposed bargaining unit employees. Management frequently violates the statute by failing to hold the outside organizers to the high standard of proof required by the case law.

The second case deals with the question of when a challenging labor organization obtains equivalent status. Again, management must be careful in determining when a union is entitled to equivalent status. Both cases reinforce a point (discussed later) that management must remain neutral during the process of selecting employee representatives.

**BARKSDALE AIR FORCE BASE and
NATIONAL FEDERATION OF FEDERAL EMPLOYEES LOCAL 1953**

45 FLRA 659 (1992)

(Extract)

Facts

This unfair labor practice case is before the Authority in accordance with section 2429.1(a) of the Authority's Rules and Regulations based on a stipulation of facts by the parties, who have agreed that no material issue of fact exists. The General Counsel and the Respondent filed briefs with the Authority.

The complaint alleges that the Respondent violated section 7116(a)(1) and (3) of the Federal Service Labor-Management Relations Statute (the Statute) by permitting a non-employee organizer of the American Federation of Government Employees (AFGE) access to its

facilities for the purpose of organizing a campaign to represent its employees at a time when those employees were represented by the Charging Party.

The Respondent is an Air Force base in Louisiana. The Charging Party, National Federation of Federal Employees, Local 1953 (NFFE), is the exclusive bargaining representative for a unit of the Respondent's professional and non-professional civilian employees who are paid from appropriated funds. At all times material to this case, NFFE and the Respondent were parties to a collective bargaining agreement that expired on April 13, 1991.

On December 11, 1990, the National Organizer for AFGE sent a letter to the Commander of the base, stating in part as follows:

By way of this letter, [AFGE] is requesting access to the employees of Barksdale Air Force Base. The purpose of this request is for representational recognition.

It is understood that non-recognized labor organizations must first demonstrate that the targeted unit employees are inaccessible to alternate means of communication, as we do not have the home phone and mailing addresses to these employees our communication has been ineffective, therefore, we are requesting your permission to contact the employees at their work site.

The campaigning activities would be restricted to the entrance and/or exit of the employees['] work areas and would not in any way interfere with their job.

We would also like to request a roster containing the breakdown on the number of employees and the location in which they work. The period for which this request is made, to begin, December 17, 1990 through March 1991.

By letter dated December 17, 1990, the Respondent responded to the request, stating in part:

Normally, non-employee representatives of unions that do not have exclusive representative status for agency employees have no right of access to the agency premises to campaign; however, you have provided sufficient justification that will allow your permission. Therefore your request . . . is approved.

From December 17, 1990, through March 31, 1991, a nonemployee organizer for AFGE had access to the base for the purpose of organizing for representational recognition by AFGE. At that time, no petition for representation had been filed with the Authority by AFGE, but the Respondent was unaware of this fact.

The parties stipulated that at a hearing the Respondent would have produced testimony to show that during the period from August 1990 to April 1991, the base was under a heightened state of security due to the Desert Shield and Desert Storm actions and that the base was under a threat of anti-terrorist[sic] activity against its installations and personnel. According to the stipulation, the Respondent would have argued that the base is not an open base even during normal times; that during this period the AFGE organizers would not have been allowed to campaign directly outside the gate due to security reasons; that one bargaining unit employee was engaged in campaigning for AFGE, but that management would not have provided that employee, AFGE, or the incumbent Union with the names and home addresses of unit employees; and that, therefore, the bargaining unit employees were essentially inaccessible to AFGE. Accordingly, the Respondent would have argued that it permitted the nonemployee on the base to conduct an organizing campaign on behalf of AFGE in accordance with the Department of Defense Civilian Personnel Manual.

Where the employees involved are covered by exclusive recognition, permission will not be granted for on-station organizing or campaigning activities by nonemployee representatives of labor organizations other than the incumbent exclusive union except where (1) a valid question concerning representation has been raised with respect to the employees involved, or (2) the employees involved are inaccessible to reasonable attempts by a labor organization other than the incumbent to communicate with them outside the activity's premises.

In January 1991, the Respondent and the Union began negotiations for a new collective bargaining agreement covering the unit employees, which was effective from May 8, 1991, to May 8, 1994.

Positions of the Parties

The Respondent

The Respondent concedes that an agency violates the Statute if it provides a labor organization with services or the use of its facilities at a time when that union does not have equivalent status with the exclusive representative of the agency's employees. The Respondent argues,

however, that the situation in this case falls within the exception to that rule, which was articulated in Department of the Army, U.S. Army Natick Laboratories, Natick, Massachusetts, 3 A/SMLR 193 (1973) (Natick).

The Respondent contends that, under Natick, it lawfully granted access to the AFGE organizer because it is required under paragraph 3.5 of the Civilian Personnel Manual to allow a rival union some means of communicating with employees if the rival union makes a diligent effort to contact employees and fails to do so because the employees are inaccessible. The Respondent argues that in the circumstances of this case, AFGE had no reasonable alternative means of communication with the employees. It notes that AFGE does not have the home telephone or mailing addresses of the employees and that the Respondent "is prohibited from releasing these under a series of Circuit Court decisions." Respondent's Brief at 9. It also describes the situation on the base during the military operations of Desert Shield and Desert Storm, when it "was under a heightened state of security" and "an anti-terrorist threat condition." Id. It argues that under Authority precedent it may "reasonably control . . . unions which are involved in elections campaigns from creating internal security risks to agency personnel or equipment[.]" Id. at 10. It asserts, therefore, that it properly allowed the organizer to solicit on base, adding that it was totally unaware that AFGE had failed to file a petition for representation with the Authority.

B. General Counsel

The General Counsel points to the fact that AFGE never obtained equivalent status with the incumbent Union, and argues that, as there were no extraordinary circumstances that prevented AFGE from reaching the Respondent's employees through other means, the Respondent violated section 7116(a)(3) by allowing AFGE access to the base to conduct its organizing campaign.

The General Counsel disputes the Respondent's defense that AFGE had no alternative means of reaching the employees....

The General Counsel also argues that in the Respondent's letter granting access to AFGE, the Respondent made no mention of any constraints resulting from the military operations or any heightened security. The General Counsel suggests that the use of such a defense at this point is "merely an attempt to justify actions that cannot be justified."

Finally, the General Counsel argues that the Civilian Personnel Manual cannot sanction the Respondent's failure to follow the Statute because the Respondent summarily granted AFGE access without

determining whether AFGE had in fact made a diligent effort to contact the employees, as required by the Manual.

Analysis and Conclusions

Under section 7116(a)(3) of the Statute, an agency unlawfully assists a labor organization when it grants a rival union without equivalent status access to its facilities for the purpose of organizing its employees. See, for example, Gallup Indian Medical Center 44 FLRA 217 (1992). As an exception to this rule the Authority has held that a union lacking equivalent status "may obtain access to an agency's facilities if it demonstrates to the agency that, after diligent effort, it has been unable to reach the agency's employees through reasonable, alternative means of communication." Social Security Administration, 45 FLRA 303 at 318 (1992) (quoting American Federation of Government Employees v. FLRA, 793 F.2d 333, 337 n.9 (D.C. Cir. 1986)).

This exception was first applied in Natick by the Assistant Secretary of Labor for Labor-Management Relations (Assistant Secretary) under Executive Order 11491, the predecessor to the Statute. Natick involved a facility that was guarded and enclosed by a high fence. Although the evidence established that the employees were difficult to reach entering and exiting the facility, the Assistant Secretary concluded that nonemployee organizers for a rival union that did not have equivalent status could not gain access outside its premises. In reaching this conclusion, the Assistant Secretary examined whether the rival union had "made a diligent, but unsuccessful, effort to contact the employees away from the [employer's] premises and [whether] its failure to communicate with the employees was based on their inaccessibility." 3 A/SLMR at 196. Finding insufficient evidence of inaccessibility under this analysis, the Assistant Secretary found that the agency had violated the Executive Order by permitting access to its premises to nonemployee organizers for the rival union. . . .

In this case there is no evidence that the Respondent inquired as to the measures taken by AFGE to contact the employees on the Respondent's premises without using nonemployee organizers to do so. Significantly, there is evidence that one employee already is engaged in campaigning for AFGE. It is established Authority law that the Respondent may not interfere with that employee's right to distribute materials for AFGE on its premises if the distribution takes place in non-work areas during non-work times. (cite omitted) Nonetheless, there is no evidence that the Respondent took into account that employee's efforts on behalf of AFGE when determining that its employees were inaccessible to AFGE's organizing campaign.

Moreover, there is no evidence whatsoever to indicate whether the Respondent attempted to ascertain measures taken by AFGE to contact the employees off the base other than AFGE's unsuccessful attempt to obtain the home telephone numbers and addresses of the employees. For example, the Respondent did not inquire as to whether AFGE had made any effort to reach the employees through the media or by distributing leaflets on or near public transportation or in popular gathering spots, such as malls where employees are known to congregate. In the absence of such information regarding AFGE's organizational efforts, the Respondent had no basis on which to grant access to a labor organization without equivalent status. In this regard, the Respondent appears to defend its decision to grant access to AFGE by stating only that it is unable to furnish the incumbent Union with the addresses of its employees, and, therefore, that it could not provide that information to any other union. As we have shown above, contact with employees at their homes is not the only way by which a rival union can attempt to communicate with employees away from the workplace. Whether the Respondent fulfills its obligations under the Statute with regard to the incumbent Union should have no bearing on the rights of a rival union to organize on the Respondent's premises.

Finally, we conclude that it is not relevant to the disposition of this case that the Respondent assertedly did not know that AFGE had not filed a petition for an election when the Respondent permitted the AFGE organizer access to the base. An agency has a statutory obligation under section 7116(a)(3) to ensure that it does not provide unlawful assistance to a union without equivalent status. Therefore, before granting access to its employees and facilities to nonemployee organizers for a rival union, the agency is obligated to determine whether that union has achieved equivalent status and, if it has not, whether its failure to communicate with the employees was based on their inaccessibility. If an agency does not make such inquiries, it acts at its peril.

Accordingly, we conclude that the Respondent violated section 7116(a)(3) of the Statute by granting access to its premises to a nonemployee organizer for AFGE at a time when AFGE did not have equivalent status with the incumbent union and had not established that its failure to communicate with the Respondent's employees was based on their inaccessibility.

Order

{The Air Force was ordered to cease and desist from providing assistance to AFGE when it did not have equivalent status and to post a notice provided by the Authority.}

The Supreme Court ruled that release of home addresses and telephone numbers of federal employees, in a bargaining unit, to a union violates the Privacy Act. DOD v. FLRA, 114 S.Ct. 1006 (1994).

**U.S. DEPARTMENT OF DEFENSE
DEPENDENTS SCHOOL PANAMA REGION
44 FLRA 419 (1992)**

(Extract)

This case is before the Authority on an application for review filed by the Panama Canal Federation of Teachers, Local 29 (PCFT) pursuant to section 2422.17(a) of the Authority's Rules and Regulations. The Education Association of Panama (EAP) filed an opposition to the application for review.

The Regional Director conducted an election in a unit of Activity employees in which PCFT was the certified exclusive representative. A majority of the valid votes counted was cast for PCFT. Timely objections to the election were filed by EAP.

In her Decision and Order on Objections to Election, the Acting Regional Director (ARD) set aside the election and directed that another be conducted on the ground that the Activity had improperly denied EAP access to certain Activity facilities and services. PCFT seeks review of the ARD's decision on this issue.

For the following reasons, we grant the application for review because we find that a substantial question of law and/or policy is raised because of an absence of Authority precedent on the issue involved in this case and, for reasons which differ in part from those of the ARD, we will set aside the election.

Background

On January 3, 1991, EAP filed a petition seeking an election in a unit of employees represented by PCFT. By letter to the Activity dated January 28, 1991, EAP asserted that it had achieved "equivalent status" with PCFT and, as a result, was entitled to "equivalent bulletin board space at each

school and the right to use the internal mail system." Letter of January 28, 1991. EAP renewed its requests for access to the bulletin board space and internal mail system by letters dated February 1 and February 7, 1991. The Activity refused the requests and asserted, among other things, that granting EAP access to the disputed facilities and services at that time would constitute an unfair labor practice under section 7116(a)(3) of the Statute.

By letter dated February 6, 1991, the Authority's Regional Office directed the Activity to post a notice of the petition. After examining a list of unit employees provided by the Activity and comparing EAP's showing of interest to that list, the Regional Office determined, on March 12, 1991, that the showing of interest was adequate and so notified the Activity. On that date, the Activity granted EAP's request for access to the requested facilities and services. Pursuant to the parties' agreement, a representation election was held on May 9, 1991. A majority of the valid votes counted was cast for PCFT. EAP then filed objections to the election.

Acting Regional Director's Decision

Before the ARD, EAP contended, as relevant here, that it achieved equivalent status with PCFT on January 3, 1991, the date on which it filed the representation petition. Accordingly, EAP argued that, as of that date, it should have been granted access to bulletin boards in various locations as well as the Activity's internal mail system.

The ARD agreed with EAP. [T]he ARD determined that "[a] labor organization acquires equivalent status when it has raised a question concerning representation by filing a representation petition or becoming an intervenor in such a pending representation petition." (cites omitted). [T]he ARD further determined that "EAP acquired equivalent status when it filed the petition and was thereafter entitled under [s]ection 7116(a)(3) of the Statute to the same and customary and routine services and facilities that DoDDS had granted to the incumbent Union, PCFT." (cites omitted). Based on these findings, the ARD sustained EAP's objection to the election and directed that the election be set aside and another be conducted.

* * *

Analysis and Conclusions

* * *

PCFT argues that its application for review should be granted because the ARD's decision departs from Authority precedent. We disagree and conclude, instead, that there is an absence of Authority

precedent on the issue of when a petitioning union acquires equivalent status, within the meaning of section 7116(a)(3) of the Statute, so as to be entitled to be furnished customary and routine facilities and services.

* * *

In none of these cases did the Authority address the issue of when a petitioning union acquires equivalent status. Accordingly, as no case in which such issue was addressed has been cited or is apparent to us, we conclude that there is an absence of Authority precedent on this issue and we grant PCFT's application for review.

We note that although section 7116(a)(3) of the Statute refers to "labor organizations having equivalent status[,]'" and although the legislative history of the Statute contains an example of equivalent status, the Statute does not define that term. Consistent with the plain wording of section 7116(a)(3), our task is to determine when, for the purposes of that section, two or more unions have the same status under the Statute. In the case before us, one of those unions is an incumbent exclusive representative. Accordingly, the question is when, or how, a petitioning union acquires a status which is equivalent to that of an incumbent for the purposes of section 7116(a)(3) of the Statute.

Section 7111 of the Statute sets forth the process by which unions are certified as exclusive representatives. As relevant here, under that section, a union seeking exclusive recognition must file with the Authority a petition alleging that 30 percent of the employees in an appropriate unit wish to be represented by the union. Section 7111(f) provides that exclusive recognition may not be accorded a union if, among other things, there is not credible evidence that at least 30 percent of the employees in the relevant unit wish to be represented by the union.

Section 7111(b) provides that the Authority shall investigate a representation petition and, if there is reasonable cause to believe that a question concerning representation exists, shall provide an opportunity for a hearing or supervise and conduct an election. In conducting such investigation, the appropriate Regional Director determines, among other things, the adequacy of a showing of interest. 5 C.F.R. § 2422.2(f)(1). After the Regional Director determines that a petition establishes a *prima facie* showing of interest, the Regional Director so notifies the affected activity and requests the activity to post copies of a notice of petition in certain places and furnish the Regional Director a current list of employees included in or excluded from the unit described in the petition. 5 C.F.R. § 2422.4. . . . A party may challenge the validity of a showing of interest

and/or may intervene by filing its challenge or intervention with the Regional Director within 10 days after the posting. 5 C.F.R. § 2422.2(f)(2).

It is clear from the foregoing that certain statutory and regulatory requirements are applicable to representation petitions. It is clear also that such petitions must be investigated to determine whether the requirements have been satisfied. As such, we are not persuaded that the mere filing of a representation petition automatically confers on the filing party a status equivalent to that of an incumbent. Instead, we conclude that a petitioning union acquires equivalent status for the purposes of section 7116(a)(3) when an appropriate Regional Director determines, and notifies the parties, that the petition includes a *prima facie* showing of interest and merits further processing. Therefore, consistent with the Authority's Rules and Regulations, we conclude that a petitioning union acquires equivalent status with an incumbent at such time as the Regional Director determines, and notifies the appropriate parties, that a notice of the petition will be posted.

In our view, this approach protects the rights of all parties. It protects the rights of an incumbent union by assuring that a petitioning union will not have access to an agency's facilities and services for campaign purposes based on a facially invalid petition or showing of interest. We note that, consistent with section 205.025 of the General Counsel Case Handling Manual, "[a]ll authorization material must be checked completely in determining the existence of a *prima facie* showing of interest." As such, this approach would not, as alleged by PCFT with respect to the principle applied by the ARD, "encourage labor organizations to file frivolous representation petitions without an adequate showing of interest in the hope of gaining equivalent status and organizing at the expense of incumbent labor organizations." Application for Review at 8. At the same time, this approach assures a petitioning union that it will be furnished with customary and routine facilities and services at the same time - when notices are posted - that unit employees are made aware of a petition and are, therefore, likely also to be aware of the relative status of a petitioner and an incumbent. Finally, this approach enables agencies and activities easily to determine whether a labor organization is entitled, on request, to be furnished facilities and services under section 7116(a)(3) of the Statute.

* * *

In this case . . . it is not clear precisely when the parties received the notification or otherwise were made aware by the Regional Office that EAP's petition was facially sufficient and the notices would be posted. We find it unnecessary to determine that date, however, because it is clear that

the notification and the parties' receipt of it substantially preceded March 12, 1991, the date on which EAP was granted access to the disputed facilities and services. Therefore, in agreement with the ARD's conclusion but for reasons which differ from the ARD, we find that EAP's objection to the election has merit. Accordingly, we sustain the ARD's decision to set aside the election and direct that another election be conducted in accordance with the Authority's Rules and Regulations.

To understand the rules regarding management's obligation to permit unions to solicit members on installation premises, it may be helpful to consider the practice in the private sector. The Supreme Court held that an employer may deny access to his property to nonemployee union organizers, provided (1) the union is reasonably able to communicate with the employers by other means, and (2) the employer's denial does not discriminate against the union by permitting other unions with equal status to solicit or distribute literature. NLRB v. Babcock & Wilcox Co., 351 U.S. 105 (1956). The Supreme Court recently reaffirmed the rules set out in Babcock. See, Lechmere, Inc v. NLRB, 502 U.S. 527, 112 S.Ct. 841, 117 L.Ed. 2d. 79, (1992).

In National Treasury Employees Union v. King, 798 F.Supp. 780 (D.D.C. 1992) the National Treasury Employees Union (NTEU) successfully raised a constitutional challenge to the limitation of outside union solicitation in public areas under the control of a federal agency, when that agency has treated the location as a public forum. NTEU requested permission to solicit membership at a Social Security Administrative facility. The agency denied permission on the grounds that allowing such access would be an unlawful assistance of a rival union. This position was supported by the FLRA. Social Security Administration and National Treasury Employees Union and American Federation of Government Employees, 45 FLRA 303 (1992). The court, however, found this restriction constituted a violation of the First Amendment of the Constitution since the agency had allowed charitable organizations to conduct solicitations at the same spot. By allowing charitable organizations to use the sidewalk, the agency had converted the location into a public forum and could no longer limit the union expression at that location.

In a related case, National Treasury Employees Union v. FLRA, 986 F.2d 537 (D.C. Cir. 1193), the FLRA was directed to consider the constitutional (First Amendment) implications of its statutory analysis. The case also involves NTEU's attempt to solicit members at the Social Security Administration. The FLRA upheld the agency's denial of access on the basis of the statute, 5 U.S.C. § 7116(a)(1) and (3). The FLRA expressly refused to consider the constitutional issues when interpreting the statute. The court remanded the case to the FLRA for reconsideration of the statutory provisions in light of the constitutional issues raised. The FLRA in turn remanded to the Regional Director to develop the factual record. Social Security Administration and

NTEU, 47 FLRA 1376 (1993). NTEU requested reconsideration of the remand which was denied. SSA and NTEU, 48 FLRA 539 (1993).

For another case on this area see, AFGE v. FLRA, 840 F.2d 947 (D.C. Cir. 1988).

b. Solicitation by Employees.

Employees who work on the installation are treated differently from non-employee organizers. They may not be excluded from the installation as the nonemployee may be. However, they may be restricted in their activities. Generally, management may limit oral communications between employees to non-duty time and the distribution of literature to nonduty time and non-work areas. In addition, solicitation cannot interfere with work. The following decision discusses the restrictions which may be imposed.

**OKLAHOMA CITY AIR LOGISTICS CENTER (AFLC)
TINKER AIR FORCE BASE, OKLAHOMA and AFGE
6 FLRA 159 (1981)**

(Extract)

* * *

Pursuant to section 2423.29 of the Authority's Rules and Regulations (5 CFR § 2423.29) and section 7118 of the Federal Service Labor-Management Relations Statute (the Statute), the Authority has reviewed the rulings of the Judge made at the hearing and finds that no prejudicial error was committed. The rulings are hereby affirmed. Upon consideration of the Judge's Recommended conclusions and recommendations entire record, the Authority hereby adopts the Judge's findings, conclusions and recommendations including his recommended order, except for those portions of the Recommended Decision and Order specifically discussed herein.

* * *

At the hearing, the complaint was amended at the request of the General Counsel to include an allegation that Respondent maintained a no-solicitation rule which prohibited all paid-time solicitation in violation of section 7116(a)(1) of the Statute. Specifically, the General Counsel argued that Respondent's prohibition of solicitation during an employee's free or

nonduty time, albeit paid-time, was violative of the Statute. The Respondent concedes that such a rule was maintained and that the prohibition of solicitation was extended to include employees' paid break and lunch periods. Moreover, probationary employee Beasley was admonished for his break-time solicitation activities; indeed, his alleged improper solicitation was given by the Activity as a reason for his termination.

The Judge found that the Respondent's maintenance of the rule prohibiting solicitation of membership by the Union during all paid breaks and its discipline of probationary employee Beasley for violation of this rule constituted violations of section 7116(a)(1) of the Statute. In so finding, the Judge noted the basic difference between duty time (clock time) and working time, and noted further that no-solicitation rules which seek to prohibit solicitation during all duty time violate the rights of employees.

The Authority adopts the Judge's conclusion in this regard. We note that the Respondent has granted designated rest breaks and paid lunch breaks pursuant to Department of Air Force Regulation 40-610 and that section 7131(b) of the Statute requires that 'solicitation of membership . . . be performed during the time the employee is in a nonduty status.' However where, as here, it has been determined that employees, at the discretion of management, have been assigned periods of time during which the performance of job functions is not required (i.e., paid free time), the Authority finds that such time falls within the meaning of the term 'nonduty status' as used in section 7131(b). Thus, solicitation of membership during such time is permissible. Accordingly, as concluded by the Judge, the Respondent's conduct in maintaining a rule prohibiting solicitation of membership during such breaks and in disciplining employee Beasley for violation such an unlawful rule, violated the Statute. . . .

In a series of cases involving a census employee named Hanlon, the Authority outlined the rules concerning solicitation in the work place by employees. In Department of Commerce, Bureau of Census and Edward Hanlon, 26 FLRA 311 (1986), the authority summarized the existing rules:

The FLRA has held that employees has a right, protected by Section 7102 of the Statute, to solicit membership and distribute literature on behalf of labor organizations during non-work time in non-work areas. (Cites omitted). The FLRA has further held that an employee has the right to solicit membership on behalf of a labor organization while in non-duty status in work areas where the employees being solicited are also in non-duty status, absent disruption of the activity's operations. (Cites omitted). . . .

. [A]n agency policy or rule prohibiting solicitation by employees, on work premises, during non-duty time is presumptively invalid (citing Tinker).

The Authority then found it to be an unfair labor practice for the Bureau of Census to prohibit employees from soliciting membership in a labor organization during non-work time in work areas where there is no disruption of work.

In General Services Administration and Edward Hanlon, 26 FLRA 719 (1987), The Authority found an unfair labor practice in the GSA's refusal to allow Hanlon to show a film or video, during non-work times in non-work areas of the federal building, including the lobby. In GSA and Edward Hanlon, et. al., 29 FLRA 684 (1987), the Authority found unfair labor practices in the agency's attempt to limit the times Hanlon could use the lobby and to limit the content of the union materials. The materials included information on commercial products available to union members. (There are numerous other decisions in which Mr. Hanlon is a named party. The most recent appears at 41 FLRA 436 (1991).)

2-3. The Representation Petition.

NOTE: In 1996, the FLRA amended its rules relating to Representation Proceedings. The new rules provide for one type of petition where the party describes the purpose for the petition. Previously, the FLRA had numerous types of petitions, each with a single function. These new rules, amending 5 CFR parts 2421, 2422 and 2429, were effective 15 March 1996.

a. Petition Seeking Election.

A union which desires a secret ballot election to determine whether employees desire it as their exclusive representative files an petition with the Regional Office of the Authority. Instructions relating to the filing of petitions are in 5 C.F.R. § 2422.

b. Showing of Interest.

The petition must be accompanied by a 30% showing of interest. 5 U.S.C. §711(b)(1) and 5 C.F.R. §2422.3. The "showing of interest" is a list of employees who have indicated they desire to be represented by a particular labor organization. Such indication may be in many different forms, such as: evidence of membership in a labor organization; employees' signed authorization cards or petitions authorizing a labor organization to represent them for purposes of exclusive recognition; unaltered allotment of dues forms executed by the employee and the labor organization's authorized official; current dues records; an existing or recently expired agreement; current exclusive recognition or certification. The original representation petition "showing of interest" list must number at least 30 percent of the eligible employees in the proposed bargaining unit. Those on the list are not necessarily union members nor

are they required to vote for the union. They only need to have indicated they would support the union's request for an election.

Section 7111(b) provides:

(b) If a petition is filed with the Authority--

(1) by any person alleging--

(A) in the case of an appropriate unit for which there is no exclusive representative, that 30 percent of the employees in the appropriate unit wish to be represented for the purpose of collective bargaining by an exclusive representative. . . .

the Authority shall investigate the petition, and if it has reasonable cause to believe that a question of representation exists, it shall provide an opportunity for a hearing (for which a transcript shall be kept) after reasonable notice. If the Authority finds on the record of the hearing that a question of representation exists, the Authority shall supervise or conduct an election on the question by secret ballot. . . .

In North Carolina Army National Guard Raleigh, North Carolina and Association of Civilian Technicians, 34 FLRA 377 (1990), the Authority spelled out the extent to which it will review a Regional Director's ruling regarding the sufficiency of the showing of interest. A Regional Director's determination of the adequacy of the showing of interest is administrative in nature and is not subject to collateral attack at a unit or representation hearing. 5 C.F.R. § 2422.[9]. However, if a Regional Director dismisses a petition based on an insufficient showing of interest, an application for review may be filed with the Authority in accordance with procedures set forth in section 2422.[31]. *Id.* See also, U.S. Coast Guard Finance Center, 34 FLRA 946 (1990).

c. Timeliness.

The original petitioner and subsequent intervenors must file their petitions within certain time limits or the Regional Director will dismiss the petitions (FSLMRS § 7111). These time limit rules are known as the "election bar," the "certification bar," and the "contract or agreement bar."

1. Election Bar.

FSLMRS §7111(b). "If a petition is filed with the Authority . . . (A) in the case of an appropriate unit for which there is no exclusive representative, . . . an election under this subsection shall not be conducted in any appropriate unit or in any subdivision thereof within which in the preceding 12 calendar months a valid election under the subsection has been held."

5 C.F.R. § 2422.12(a) Election Bar. "Where there is no certified exclusive representative, a petition seeking an election will not be considered timely if filed within twelve (12) months of a valid election involving the same unit or a subdivision of the same unit."

A petition will be dismissed if the unit petitioned for is a subdivision of a unit in which an election had been held within the preceding 12 months. However it will be accepted if the petitioned for unit contains a smaller unit which had an election within the previous 12 months.

For election bar decisions, see Federal Aviation Administration, Department of Transportation, A/SLMR No. 173 (July 20, 1973) and Department of Interior, Bureau of Indian Affairs, Navajo Area, Gallup, N.M., A/SLMR No. 99 (Oct. 12, 1971).

2. Certification Bar.

FSLMRS § 7111(f)(4). Exclusive recognition shall not be accorded ". . . if the Authority has, within the previous 12 calendar months, conducted a secret ballot election for the unit described in any petition under this section and in such election a majority of the employees voting chose a labor organization for certification as the unit's exclusive representative."

5 C.F.R. § 2422.12(b). "Where there is a certified exclusive representative of employees, a petition seeking an election will not be considered timely if filed within twelve (12) months after the certification . . ."

The Regional Director will not hold a representation election if a union was certified as the exclusive representative within the last twelve (12) months. The rationale for the certification bar is "to afford an agency or activity and a certified incumbent labor organization a reasonable period of time in which to initiate and develop their bargaining relationship free of rival claims." Department of the Army, U.S. Army Engineer District, Mobile, Ala., A/SLMR No. 206 (Sept. 27, 1972).

A signed collective bargaining agreement ends application of this bar and triggers the contract or agreement bar provisions discussed below.

For other certification bar cases, see Army and Air Force Exchange Service, Dix-McGuire Consolidated Exchange, Fort Dix, N.J., A/SLMR No. 195 (Aug. 24, 1972) and Department of Interior, Bureau of Indian Affairs, Navajo Area, Gallup N.M., A/SLMR No. 99 (Oct. 12, 1971).

3. Agreement Bar.

A valid contract covering part of the employees in the proposed unit bars a petition filed by another union. The statute provides:

5 U.S.C. § 7111(f)(3) if there is then in effect a lawful written collective bargaining agreement between the agency involved and an exclusive representative (other than the labor organization seeking exclusive recognition) covering any employees included in the unit specified in the petition, unless--

(A) the collective bargaining agreement has been in effect for more than 3 years, or

(B) the petition for exclusive recognition is filed not more than 105 days and not less than 60 days before the expiration date of the collective bargaining agreement;"

5 CFR § 2422.12(c) Bar during . . . agency head review. A petition seeking an election will not be considered timely if filed during the period of agency head review under 5 U.S.C. 7114(c). This bar expires upon either the passage of thirty (30) days absent agency head action, or upon the date of any timely agency head action.

5 CFR § 2422.12(d) Contract bar where the contract is for three (3) years or less. Where a collective bargaining agreement is in effect covering the claimed unit and has a term of three (3) years or less from the date it becomes effective, a petition seeking an election will be considered timely if filed not more than one hundred and five (105) and not less than sixty (60) days prior to the expiration of the agreement.

5 CFR § 2422.12(e) Contract bar where the contract is for more than three (3) years. Where a collective bargaining agreement is in effect covering the claimed unit and has a term of more than three (3) years from the date it became effective, a petition seeking an election will be considered timely if filed not more than one hundred and five (105) and not less than sixty (60) days prior to the expiration of the initial three (3) year period, and any time after the expiration of the initial three (3) year period.

In North Carolina Army National Guard Raleigh, North Carolina and Association of Civilian Technicians, 34 FLRA 377 (1990) the FLRA discussed the requirements for filing RO petitions and the time for submitting the petition. They held that a petition for certification of representative must be received by the appropriate Regional director during the open period. The petition must be accompanied by an adequate showing of interest. When authorization cards are submitted as evidence of a showing of interest, the cards must be signed and dated. 5 C.F.R. §2421.16.

The Authority also discussed the timing of additional showings of interest when there is a dispute as to the number of employees in the proposed bargaining unit. The Union may file an additional showing of interest once the unit size is determined. However, this additional showing of interest must have been signed and dated before the expiration of the open period.

A petition may be filed during the window period before the termination date or the automatic renewal date. If a contract has been extended prior to sixty (60) before the termination or automatic renewal date, the extension or renewal does not bar a petition filed during the window period. 5 CFR § 2422.13(g).

Similarly, an agreement between the parties to extend the terms of the collective bargaining agreement during renegotiations does not bar a petition. Army National Guard, Camp Keyes, Augusta, Maine, 34 FLRA 59 (1989) citing, Department of the Army, Corpus Christi Army Depot, 16 FLRA 281 (1984).

The sixty day period prior to the termination date or automatic renewal date is the insulated period and is intended to protect the incumbent union from raiding unions and to stabilize bargaining relationships.

If a contract is of more than three years duration and has a definite termination or automatic renewal date, it bars an election only for the first three years. If there is no termination or automatic renewal date, the contract does not bar a petition anytime.

There are a variety of issues associated with the application of an agreement bar. Several issues are discussed below.

1. For purposes of the agreement bar, a negotiated agreement must contain a clear and unambiguous effective date and language setting forth its duration. 5 CFR § 2422.12(h). Watervliet Arsenal v. NFFE, 34 FLRA 98 (1989); U.S. Army Recruiting Command, Concord N. H. and AFGE, 14 FLRA 73 (1984). In U.S. Department of the Interior, Redwood National Park, 48 FLRA 666 (1993) the Authority held that a smudge or extra mark on reproduced copies of the collective bargaining agreement could render the effective date ambiguous and prevent the agreement from acting as a bar.
2. An agreement that goes into effect automatically and that does not contain the date on which the agreement becomes effective does not constitute a bar to an election petition. 5 C.F.R. § 2422.12(h). See Watervliet Arsenal.
3. In determining the open period, the effective date rather than its execution date is used. IRS, North Atlantic Service Center, 3 FLRA 385 (1980).
4. For an agreement subject to automatic renewal the Authority held that a request to negotiate modifications in an existing agreement serves to prevent the automatic renewal. Office of the Secretary, Headquarters, Department of Health and Human Services, 11 FLRA 681 (1983).
5. Settlement of an ULP charge which required the parties to reopen the existing collective bargaining agreement did not remove the collective bargaining agreement as a bar. The settlement agreement expressly provided that the present agreement shall be extended in its entirety until a new agreement is reached and approved. See, Department of Housing and Urban Development, Newark Office, 37 FLRA 1122 (1990).

2-4. Posting of Notice [5 C.F.R. § 2422.7].

- a. After a petition has been filed, the Regional Director will furnish the activity with copies of notices which must be posted where employee notices are normally posted. The notice contains information as to the name of the petitioner and a description of the unit involved. The unit description will specify both included and excluded personnel.
- b. The notice not only advises the employees that an RO petition has been filed, but also puts potential union intervenors on notice that they have 10 days subsequent to posting of the notice to intervene in the election.

2-5. Intervention [FSLMRS § 7111(c) and 5 C.F.R. § 2422.8].

5 U.S.C. § 7111(c) "A labor organization which--

(1) has been designated by at least 10 percent of the employees in the unit specified in any petition filed pursuant to subsection (b) of this section (10% showing of interest);

(2) has submitted a valid copy of a current or recently expired collective bargaining agreement for the unit; or

(3) has submitted other evidence that it is the exclusive representative of the employees involved;

may intervene with respect to a petition filed pursuant to subsection (b) of this section and shall be placed on the ballot of any election under such subsection (b) with respect to the petition."

5 C.F.R. § 2422.8(d) provides that "An incumbent exclusive representative . . . will be considered a party in any representation proceeding raising issues that affect employees the incumbent represents, unless it serves the Regional Director with a written disclaimer of any representation interest for the claimed unit" For a discussion of disclaimers, see, HHS and AFGE and NTEU, 11 FLRA 681 (1983). The affect of the incumbent union's rejecting its intervention rights is to be placed in a lower status than the petitioner union. It will not be on the ballot and may not be given as many opportunities to solicit employees to reject the petitioner union.

2-6. Consent to Elections [5 C.F.R. § 2422.16].

After the notice is posted and the 10 day period for a union to intervene has expired, the parties will meet and attempt to agree on the conduct of the election. They will attempt to agree to a mutually satisfactory date, place, and time of the election. It is a policy to hold the election at the worksite so that it will be convenient for employees to vote and there will be a minimum of disruption to work. They will also attempt to agree upon the designations on the ballot, the use and number of observers, provisions for notice posting, custody of the ballot box, the time and place for counting ballots, and the rules for electioneering. The Regional Director will unilaterally resolve those matters which the parties cannot agree to.

In addition to agreeing to the conduct of the elections, many installations will negotiate campaign ground rules with the petitioning union(s). They will address where, when, and how the union may campaign on the installation. For instance, they may allow bulletin board space for union memoranda, use of the distribution system,

conference rooms for union speakers, prohibition of solicitation during duty time, and whatever other rules the parties feel should be enunciated in writing.

The Authority discussed pre-election ground rules in Fort Campbell Dependent School, 46 FLRA 219 (1992). The issue concerned the enforcement of an agreement between the parties that was contained in an agency prepared memorandum of phone calls which the union refused to sign. The Authority indicated that unsigned agreements may be enforceable. However, it had no trouble finding that the parties in this case had not reached an agreement.

2-7. Bargaining Unit Determination.

a. Introduction. One area which frequently creates controversy concerns which employees should be represented by the union, i.e., what is an appropriate bargaining unit.

A bargaining unit is a group of employees with certain common interests who are represented by a labor union in their dealings with management. It is the group of employees the union desires to represent. Typically, the union will propose a bargaining unit and management will agree or disagree with it. If there is disagreement, the Authority will make the final determination as to what is appropriate; with or without a hearing. The Authority may also disapprove a bargaining unit that the parties have agreed to.

5 U.S.C. § 7112. "Determination of appropriate units for labor organization representation.

(a)(1) The Authority shall determine the appropriateness of any unit. The Authority shall determine in each case whether, in order to ensure employees the fullest freedom in exercising the rights guaranteed under this chapter, the appropriate unit should be established on an agency, plant, installation, functional, or other basis and shall determine any unit to be an appropriate unit only if the determination will ensure a clear and identifiable community of interest among the employees in the unit and will promote effective dealings with, and efficiency of the operations of, the agency involved."

b. General Criteria. The criteria for determining whether a grouping of employees constitutes an appropriate unit are the same as they were under EO 11491: the unit must (1) ensure a clear and identifiable community of interest among the

employees in the unit, and (2) will promote effective dealings with, and efficiency of the operations of the agency involved. 5 U.S.C. § 7112(a).

The statutory criteria (community of interest, promoting effective dealings, and efficiency of operations) are, theoretically, given equal weight in analyzing the appropriateness of the unit. Effective dealing and efficiency of operations are generally considered together. The Authority examines the totality of the circumstances in each case in making appropriate unit determinations under section 7112(a)(1) of the Statute. DOJ, Office of the Chief Immigration Judge, Chicago, and AFGE, 48 FLRA 620, (1993); Office of Personnel Management, Atlanta Regional Office and AFGE, 48 FLRA 1228, 1233 (1993).

Community of Interest. The Authority has not specified individual factors or the number of factors required to determine that employees share a community of interest. Health and Human Services, Region II, and NTEU, 43 FLRA 1245 (1992). Among the factors considered when determining if a community of interest exists are: the work performed, skills, training and education of the employees, geographic proximity of work sites, relationship of the work, common supervisors, organizational relationships, common applicability of personal practices and working conditions, and bargaining histories. See, Redstone Arsenal, Alabama and AFGE, 14 FLRA 150 (1984). See also, DOJ, Office of the Chief Immigration Judge, Chicago, 48 FLRA 620 (1993).

Effective Dealings With the Agency. Among the factors considered when determining whether or not a given unit will promote effective dealings are: the level at which negotiations will take place, at what point grievances will be processed, whether substantial authority exists at the level of the unit sought, and bargaining history. See DOJ, Office of the Chief Immigration Judge, Chicago, 48 FLRA at 637; Defense Logistics Agency, Defense Plant Representative Office-Thiokol, and NFFE, 41 FLRA 316, 328-329 (1991).

Efficiency of Agency Operations. Among the factors to consider in determining whether a unit will promote the efficiency of the agency operations are: the degree to which there is interchange outside the unit sought, the extent of differences with other groups of employees outside the unit sought, whether negotiations would cover problems common to employees in the unit, and bargaining history.

In Defense Logistics Agency, Defense Plant Representative Office-Thiokol, and NFFE, 41 FLRA 316, 330 (1991), the Authority discussed efficiency of agency operations and identified several factors that would counter a finding of improved efficiency.

[W]e conclude that the petitioned-for unit would neither cause undue fragmentation nor hinder the efficiency of the Activity=s operation. In this regard, DPRO Thiokol is a separate organizational component of the Activity, a secondary level field activity, with its own commander,

performing contract administration functions at a separate manufacturer, which is geographically remote . . . The local commander has certain authority within the organizational component to administer the day-to-day mission of the organization . . . Thus we find that DPRO Thiokol is not so functionally integrated with the other organizational components of the District that the petitioned-for unit would artificially fragment or cross the Activity=s organizational line structure in a significant manner.

The Statute contains a preference for unit organization "on an agency plant, installation, functional, or other basis." 5 U.S.C. § 7112(a)(1). In OPM, Atlanta Regional Office and AFGE, 48 FLRA 1228 (1993), the Authority stated, "A proposed unit may meet the statutory criteria of effective dealings and efficiency of operations if it is structured around a functional grouping of employees who possess characteristics and concerns limited to that group." *Id.* at 1236.

The size of the proposed unit is a factor to be considered. It does not automatically disqualify a unit from being found appropriate. Size is a factor to be considered in the context of all relevant facts and circumstances. Edwards Air Force Base and Sport Air Traffic Controllers Organization, 35 FLRA 1311, 1314 (1990)(fifteen member unit).

It should be noted that there is a substantial overlap of factors with all three criteria. Satisfaction of one criteria will often satisfy all three. Questions as to the appropriate unit and related issues may be referred to the Regional Office for advice.

Although the Authority, in its unit determinations, refers to all three criteria, it appears that, apart from unit consolidation cases, greater reliance is placed on indicia of community of interest than on indicia of effective dealings and efficiency of agency operations. Such emphasis on community of interest indicia was also true of Assistant Secretary decisions. This is probably due to the influence of private sector case law under the National Labor Relations Act in which community of interest is the sole criterion of the appropriateness of units.

**FEDERAL AVIATION ADMINISTRATION,
NEW ENGLAND REGION AND AFGE
20 FLRA 224 (1985)**

(Extract)

[T]he FAA contends that the only appropriate unit is a nationwide unit of all air traffic controllers. It argues that the Regional Director's decision (recognizing a unit composed of employees in the New England

Region): (1) will not promote safe and efficient agency operations, but will result in a fragmented, diverse approach to work rules, practices, and safety issues; (2) will hinder effective accomplishment of the greatest safety in air traffic movement, and will not promote agency efficiency as required by section 7112 of the Statute; and (3) will hinder effective labor-management bargaining because control over such bargaining rests at FAA Headquarters. FAA further argues that there is no clear and identifiable community of interest among employees within the New England Region that is separate and distinct from other FAA employees in the other eight regions, but rather that a community of interest exists among all of its air traffic controllers nationwide. The Agency argued that the establishment of regional bargaining units would have a detrimental effect on both the efficiency and safety of the National Air Traffic System (NATS) and that only a nationwide unit with its inherent stability, uniformity and control would be appropriate in this case.

AFGE and NFFE contend, in support of the Regional Director's Decision, that a region-wide unit is appropriate under the criteria set forth in section 7112(a)(1) of the Statute. AFGE further contends that the FAA has not presented any evidence to demonstrate that a regional unit "creates the unacceptable risk of a diminution in the safe and efficient operations of the air traffic system; decreases the level of cooperation, trust, and standardization in the system; and raises the potential for divisions. . ." In this regard, both AFGE and NFFE argue that section 7106 of the Statute limits the scope of bargaining to the degree that standardization will not be threatened. They also argue that day-to-day operations including labor relations, are performed at the regional level, and that FAA presently has the organizational structure to deal with a regional bargaining unit in an efficient and effective manner.

* * *

In his Decision, Order and Direction of Election herein, the Regional Director found that a unit consisting of all air traffic control specialists, automation specialists, and air traffic assistants who are engaged in air traffic control duties, employed within the New England Region, Federal Aviation Administration, was appropriate for the purpose of exclusive recognition under the Statute. He based such findings on the following factors: (1) the regional unit is co-extensive in scope with a major subcomponent of the FAA and conforms to the FAA's regional personnel and labor relations structure; (2) the regional director has significant operational and administrative responsibilities within the region and has broad authority in matters involving overtime pay, awards and staffing; (3) there is common supervision of all regional employees; (4) all controllers within the FAA's New England Region are covered under the same merit

promotion, EEO and agency grievance procedures; and (5) the majority of controller reassessments are accomplished on an intra-regional basis.

Based on established precedent and the particular circumstances of this case, the Authority disagrees with the Regional Director's conclusion that a region-wide unit is appropriate herein. While the Regional Director's Decision does contain factual support for his finding that the employees sought to be represented within the New England Region share a community of interest, his Decision fails to recognize and properly evaluate the facts which clearly demonstrate that this same community of interest is equally shared by all air traffic control specialists employed throughout the FAA. The record indicates that the specific mission of all the air traffic control facilities within the FAA is to ensure the safe and efficient use of the nation's airspace, promote aviation safety, and operate a nationwide system of air navigation; that the working conditions, skills required and the duties performed by the employees of the New England Region at issue herein are the same for all such employees in the nine regions of the FAA: there is interchange and transfer of air traffic control specialists among the various regions; air traffic control specialist positions are advertised on a nationwide basis; that personnel policies and practices are centrally established and administered at FAA Headquarters and apply uniformly to all employees of the FAA, not just to the employees of the New England Region; and that labor relations policy also is centrally established for the entire FAA employee complement at FAA Headquarters. In this regard, while each FAA regional direction has some autonomy in handling day-to-day problems involving personnel and labor relations matters, he must strictly adhere to the guidelines and directives promulgated by FAA Headquarters. Further, all air traffic control specialists receive the same training and must maintain the same level of proficiency. Under all of these circumstances, the Authority concludes that the employees of the New England Region do not share a clear and identifiable community of interest separate and distinct from the other employees of the FAA.

Further, in disagreement with the Regional Director, the Authority finds that the proposed unit would not promote effective dealings within the FAA. In this regard, as previously discussed, FAA Headquarters establishes and administers common personnel policies and practices for all employees of the FAA, negotiating expertise is concentrated at FAA Headquarters where labor relations policy is established for all employees of the FAA, and there is both an established practice of bargaining at the national level for currently represented FAA employees and a past history of effective nationwide bargaining for air traffic control specialists. In light of these factual determinations, and for the reasons previously stated, the Authority concludes that the Regional Director's finding below that the proposed unit would promote effective dealings within the FAA is

inconsistent with the purposes and policies of the Statute, especially the policy of promoting a more comprehensive bargaining unit structure.

Finally, with respect to efficiency of agency operations, the Regional Director failed to give adequate weight to the unique importance of the National Air Traffic System and the strict requirement of nationwide uniformity to ensure the safety of the millions of people who use the air transport system. In this regard, a nationwide unit conforming to the centralized operational and organizational structure of the FAA would result in uniform policies, practices and working conditions nationally, and would reduce the potential for inconsistency among the regional offices. The Regional Director also failed to give adequate weight to the fact that the employees in the unit sought enjoy a commonality of mission, personnel policies and practices and matters affecting working conditions with all air traffic control specialists of the FAA. Accordingly, in light of these considerations, and for the reasons previously stated, the Authority concludes that the Regional Director's finding that the proposed unit would promote the efficiency of the FAA's operations is inconsistent with the purposes and policies as set forth in section 7112(a)(1) of the Statute.

c. How Appropriate Units Are Determined.

1. Agreement by Parties. Subsequent to the notice being posted, management will consider whether the unit is appropriate. Management and the union will meet and, hopefully, agree on an appropriate unit (consent agreement). This consent agreement, along with other relevant matters (such as objections based upon certification, election, and agreement bars; challenges to the union's status, etc.) will be forwarded to the Regional Director.

2. Determination by the Regional Director and the Authority.

(a) If management objects to the appropriateness of the bargaining unit, it should file an objection with the Regional Director. Further, the Regional Director will review the appropriateness of a unit even when the parties have agreed to insure it is consistent with the policies of Title VII and precedent decisions.

(b) Even when both parties strongly agree upon the composition of a unit, the Regional Director may nevertheless refuse to certify as a result of his independent evaluation of the unit.

d. Persons/Units Specifically Excluded or Distinguished.

There are certain classes of employees who are not allowed, by Title VII, to organize and be represented by an exclusive representative. Often there is an objection by management because these personnel are included in the proposed unit. 5 U.S.C. § 7112(b) and (c) provide:

(b) A unit shall not be determined to be appropriate . . . if it includes--

(1) except as provided under section 7135 (a)(2) of this title, any management official or supervisor;

(2) a confidential employee;

(3) an employee engaged in personnel work in other than a purely clerical capacity;

(4) an employee engaged in administering the provisions of this chapter;

(5) both professional employees and other employees, unless a majority of the professional employees vote for inclusion in the unit;

(6) any employee engaged in intelligence, counterintelligence, investigative, or security work which directly affects national security; or

(7) any employee primarily engaged in investigation or audit functions relating to the work of individuals employed by an agency whose duties directly affect the internal security of the agency, but only if the functions are undertaken to ensure that the duties are discharged honestly and with integrity.

(c) Any employee who is engaged in administering any provision of law relating to labor-management relations may not be represented by a labor organization--

(1) which represents other individuals to whom such provision applies; or

(2) which is affiliated directly or indirectly with an organization which represents other individuals to whom such provision applies.

1. Supervisors.

FSLMRS § 7103(a)(10). "Supervisor" means an individual employed by an agency having authority in the interest of the agency to hire, direct, assign, promote, reward, transfer, furlough, layoff, recall, suspend, discipline, or remove employees, to adjust their grievances, or to effectively recommend such action, if the exercise of the authority is not merely routine or clerical in nature but requires the consistent exercise of independent judgment, except that, with respect to any unit which includes firefighters or nurses, the term 'supervisor' includes only those individuals who devote a preponderance of their employment time to exercising such authority;"

**NAVAL EDUCATION AND TRAINING CENTER,
NEWPORT, RHODE ISLAND AND
INTERNATIONAL ASSOCIATION OF FIREFIGHTERS**

3 FLRA 325 (1980)

(Extract)

The Petitioner seeks to clarify an existing exclusively recognized unit of the civilian personnel of the Fire Protection Branch of the Naval Education and Training Center to include ten employees currently classified as Supervisory Firefighter, GS-6 (hereinafter referred to as Fire Captain), contending that these employees are not supervisors within the meaning of § 7103(a)(10) of the Statute. The Activity contends that the incumbents in the subject classification are supervisors within the meaning of § 7103(a)(10) of the Statute and, on this basis, opposes their inclusion in the certified unit. Section 7103(a)(10) defines supervisor . . .

The Fire Protection Branch is composed of one Fire Chief, two Assistant Fire Chiefs, ten Fire Captains (GS-6), 40 Firefighters (GS-5), and 12 employees who perform various functions ranging from inspectors to alarm operators. The Fire Protection Branch occupies four stations and a headquarters building in the geographical area for which it is responsible. The Headquarters is staffed by the Fire Chief and the two Assistant Fire Chiefs. Fire Station No. One is manned by eight Firefighters and two Captains, No. Three, by six Firefighters, two Captains, No. Six being two separate shifts manned each by seven Firefighters and two Captains (a total of 14 Firefighters and four Captains), plus two Firefighters who stand

duty on Gould Island, and Station No. Nine staffed by ten Firefighters and two Captains.

The Fire Chief is the primary supervisory official and is responsible for directing the administrative operation of the Fire Protection Branch. He works a standard 8:00 a.m. to 5:00 a.m. shift, Monday through Friday. The two Assistant Chiefs are supervisors, responsible for overseeing and directing the actual work-force. Their hours correspond with the 24 hour shifts which the Fire Captains and Firefighters work.

Although the Assistant Fire Chiefs are located at Headquarters, their job functions are integrally related to the activities occurring in and about the fire stations. The Assistant Chief is in charge of all firefighting operations once he arrives on the scene of the fire. In most cases, the Assistant Chief will appear from three to five minutes after the arrival of the fire crew led by the Fire Captain. In addition, the Assistant Fire Chief makes at least one daily visit to every fire station; the time spent on the visit ranges between 15 minutes and one hour. The visits may increase depending upon the nature of the problems being experienced by the particular station. The purpose of the visits is to discuss with the station's Fire Captain problems which may have arisen concerning personnel, equipment, building conditions, supplies, and/or departmental procedures. The Assistant Fire Chief is also responsible for training personnel and conducting drills in firefighting technique. The Assistant Fire Chief also officially reviews all the Performance Appraisals submitted by the Fire Captains.

The record reveals that the Fire Captains do have additional duties, responsibilities, and authority in the fire station as compared with the other Firefighters. Their authority is, however, limited. Fire Captains do not hire, promote, suspend, remove, transfer, furlough, layoff, or recall employees. However, Fire Captains assign tasks set out in the Daily Work Assignments, which is, in fact, a directive from Headquarters. The Daily Work Assignments designates the duties to be accomplished by the station crew as a whole on a day to day basis (washing trucks, cleaning equipment and the station). The Captain may order the Firefighter he wishes to the job. Additionally, he does not have to abide by the daily schedule, so long as the daily work assignments are completed within the week. The record discloses that the assignment of personnel to perform the daily tasks is considered a routine procedure taken directly from a long-standing and established rotation system designated to make each Firefighter share equally in all of the work.

The record further reveals that Fire Captains direct the Firefighters to a limited extent. Captains are the supervisory officer at most fires prior to

the arrival of the Assistant Fire Chief (about a three to five minute period). Assistant Fire Chiefs direct all operations once they arrive. All responses to fire are predetermined in a pre-fire plan program. More specifically, drills are conducted for specific alarms, and in case of an actual fire, the fire crew responds exactly as they had previously done in the drill. The instructions for these drills come from the Assistant Fire Chiefs.

Fire Captains do undertake annual performance evaluations of employees. Evidence indicates that not much time is devoted to this responsibility. These evaluations apparently have some impact in rating the employees in determining the order of RIF's. Captains are also responsible for approving within-grade increases to employees, but cannot award quality step increases.

The record discloses that Fire Captains do have limited authority to discipline employees. They can issue oral and written reprimands. They cannot, however, unilaterally suspend employees and the evidence indicates that their recommendations carry little, if any, weight. The Captains also have a limited authority to award employees. In evaluating employees, the ratings may be such as to gain additional seniority for the employee and/or a small monetary award. Apparently, the Captain may also submit a recommendation for an award outside of the performance evaluation. Recommendations for promotion by Captains also appear to have little influence on Activity promotional decisions.

Fire Captains do have the authority to adjust minor grievances if the settlements are satisfactory to the employee. They do not participate once a formal grievance is filed. Fire Captains do not have official contact with shop stewards. The Captains are responsible for maintaining order within the work place.

As previously indicated the Federal Labor-Management Relations Statute, § 7103(a)(10), provides that in determining the supervisory status of a firefighter, a more particular standard of assessment will be applied as compared to other employees. Section 7103(a)(10) states:

with respect to any unit which includes firefighters or nurses, the term 'supervisor' includes only those individuals who devote a preponderance of their employment time to exercising such (supervisory) authority;

The record reveals, as detailed above, that although certain aspects of the Fire Captains' job function may involve the exercise of supervisory authority, their overall employment time is spent in either routinely administering Activity directives, performing routine and clerical duties, or waiting to respond to an alarm.

The Authority thus finds that the evidence contained in the record supports the Petitioner's contention that the Fire Captains, GS-6, are not supervisors under § 7103(a)(10) of the Statute, in that they do not devote a preponderance of their employment time to supervisory functions. Accordingly, the Authority finds Fire Captains serving at fire houses at the Naval Education and Training Center, Newport, Rhode Island, are not supervisors within the meaning of the Statute, and will be included within the bargaining unit.

IT IS HEREBY ORDERED that the unit sought to be clarified, in which exclusive recognition was granted to the International Association of Firefighters, Local F-100, on July 8, 1974, at the Naval Education and Training Center, Newport, Rhode Island, be and hereby is, clarified by including in said unit the position of Supervisory Firefighter, GS-6 (Fire Captain).

The statute requires the employee to consistently exercise independent judgment in order to be considered a supervisor. A WG-11 electrician who headed the evening shift, handed out preexisting work assignments, and directed the work of other shift employees was not a supervisor. The directing and assigning of work the electrician did was routine and did not require the consistent exercise of independent judgment, U.S. Army Armor Center, Fort Knox, KY, 4 FLRA 20 (1980). See e.g., U.S. Army, Dugway Proving Ground, Dugway, Utah, 8 FLRA 684 (1982)(the Authority sometimes refers to these as "leader" positions).

The Authority has held that the employee is a supervisor if the employee consistently exercises one of the supervisory indicia set forth in 5 U.S.C. § 7103(a)(10). Department of Veterans Affairs, VA Medical Center, Allen Park, Michigan, 35 FLRA 1206 (1990).

In Department of the Interior, BIA, Navajo Area Office, Gallup, New Mexico and American Federation of Teachers, 45 FLRA 646 (1992), the Authority adopted the principles used by the private sector (National Labor Relations Board) in determining whether a person is a supervisor. The Authority found that the employee's evaluations of other employees, which would affect hiring decisions and were based on the employee's own independent judgment, made him a supervisor.

The temporary detail of a supervisor to an unclassified position pending the outcome of an investigation does not justify including him in the bargaining unit. The union argued that since employees temporarily detailed as supervisors were excluded

from the unit, employees temporarily detailed from supervisory positions should become part of the unit. The FLRA disagreed and found that the employee lacked a community of interest with those in the bargaining unit. Federal Aviation Technical Center, Atlantic City Airport, 44 FLRA 1238 (1992)(the temporary detail had been for over one year when the union filed the request to include the employee in the unit).

To be classified as a supervisor, the supervisor must exercise authority over individuals who are "employees" as defined in section 7103(a)(2). If the supervisor has authority only over aliens, non-US citizens or military personnel, he is not a supervisor. Section 7103(a)(10) provides that "supervisor" means an individual having authority over "employees," who are defined, in pertinent part, as individuals employed in an agency, but does not include an alien, or noncitizen who occupies a position outside the United States or a member of the uniformed services. See, Interpretation and Guidance, 4 FLRA 754 (1980), and New York, N.Y., 9 FLRA 16 (1982).

A supervisor or management official may join a union, but may not participate in management of the union or be a member of the union leadership. See, Department of Labor and Susan Wuchinich, 20 FLRA 296 (1985); Nuclear Regulatory Commission and NTEU, 44 FLRA 370 (1992)(Both these cases began as unfair labor practice cases under 5 U.S.C. § 7116(a)(3), alleging management interference with a labor organization.)

5 U.S.C. § 7135(a) contains an exception (grandfathering in several existing units) which allows initial or continued recognition of a bargaining unit containing only management officials or supervisors. In such cases, the issue of union leadership creates several interesting questions.

2. Confidential Employees.

"[C]onfidential employee' means an employee who acts in a confidential capacity with respect to an individual who formulates or effectuates management policies in the field of labor-management relations". 5 U.S.C. § 7103(a)(13)

**General Services Administration,
National Archives and Records Service
8 FLRA 333 (1982)**

(Extract)

Position No. 8257, Management Analyst, GS-343-13, Program
Management and Coordination Division

The incumbent, Yvonne M. Starbuck, is one of two individuals who occupy Position No. 8257 in the ORIM's Program Management and Coordination Division. Only the position occupied by Ms. Starbuck is in dispute as to confidential employee status.

The Authority finds the position occupied by this incumbent to be that of a "confidential employee" within the meaning of section 7103(a)(13) of the Statute. As a member of management's negotiation team and in dealing with union representatives on a day-to-day basis, the individual in this position acts in a confidential capacity with respect to those management officials who formulate or effectuate management's policies in the field of labor-management relations. Accordingly, the Authority shall order that Position No. 8257, Management Analyst, GS-343-13, Program Management and Coordination Division (Yvonne M. Starbuck), be excluded from the AFGE's exclusively recognized unit.

The Authority summarized the rules for determining if an employee is confidential as follows: "An employee is confidential if: (1) there is evidence of a confidential relationship between an employee and the employee's supervisor; and (2) the supervisor is significantly involved in labor-management relations. An employee is not confidential in the absence of either of these requirements." Department of Housing and Urban Development Headquarters and AFGE, 41 FLRA 1226, 1234 (1991) citing Department of Labor, Office of the Solicitor, Arlington Field Office and AFGE, 37 FLRA 1371 (1990)(excluding 10 General Attorney positions from the bargaining unit because the attorneys were confidential employees).

3. Management Officials.

"[M]anagement official' means an individual employed by an agency in a position the duties and responsibilities of which require or authorize the individual to formulate, determine, or influence the policies of the agency." 5 U.S.C. § 7103(a)(11).

**General Services Administration,
National Archives and Records Service
8 FLRA 333 (1982)**

(Extract)

**Position No. R562, Management Analyst, National Inspection Coordinator,
GS-343-15, Office of the Deputy Assistant Archivist**

The incumbent is nominally assigned to the ORIM's Office of the Deputy Assistant Archivist and is presently employed in such duties as gathering the materials for and drafting a five-year plan for the office and preparing a book of office internal procedures. The record is clear that the incumbent has not been permitted to effectively exercise any duties and responsibilities which would require or authorize him to formulate, determine, or influence the policies of the Activity within the meaning of section 7103(a)(11) of the Statute, as interpreted by the Authority in Department of the Navy, Automatic Data Processing Selection Office, 7 FLRA 172 (1981). Accordingly, the Authority finds the position in question not to be that of a management official, and shall order that Position No. R562, Management Analyst, National Inspection Coordinator, GS-343-15, Office of the Deputy Assistant Archivist, be included in the AFGE's exclusively recognized unit.

In Department of the Navy, Automatic Data Processing Selection Office, 7 FLRA 172 (1981) the Authority interpreted the definition of management official as, "[T]hose individuals who: (1) create, establish or prescribe general principles, plans or courses of action for an agency; (2) decide upon or settle upon general principles, plans or courses of action for an agency; or (3) bring about or obtain a result as to the adoption of general principles, plans or courses of action for an agency." *Id.*, at 177.

In United States v. Army Communications Command, Fort Monmouth, N.J. and NFFE, 4 FLRA 83 (1980), the Authority looked at numerous positions and held that auditors, electronics engineers and project officers were management officials. Communication specialists, data management officers, financial management officers, general engineers, procurement analysts, program analysts, public information officers, and traffic managers were not management officials. The rationale for each determination was linked to the duties performed, not the title of the position.

In Department of Agriculture, Food and Nutrition Service and NTEU, 34 FLRA 143 (1989) the Authority held that a computer specialist was not a management official since in the event there was a problem, the employee would only be an advisor to the

decision maker. The Authority distinguished this case from Environmental Protection Agency, Research Triangle Park, North Carolina, 12 FLRA 358 (1983) where an ADP Security Specialist was found to be a management official because he developed security policy and had the authority to shut down the facility in the event of a security breach.

4. Professionals.

FSLMRS § 7103a(15). ". . . 'professional employee' means-

(A) an employee engaged in the performance of work-

(i) requiring knowledge of an advanced type in a field of science or learning customarily acquired by a prolonged course of specialized intellectual instruction and study in an institution of higher learning or a hospital (as distinguished from knowledge acquired by a general academic education, or from an apprenticeship, or from training in the performance of routine mental, manual, mechanical, or physical activities);

(ii) requiring the consistent exercise of discretion and judgment in its performance;

(iii) which is predominantly intellectual and varied in character (as distinguished from routine mental, manual, mechanical, or physical work); and

(iv) which is of such character that the output produced or the result accomplished by such work cannot be standardized in relation to a given period of time; or

(B) an employee who has completed the courses of specialized intellectual instruction and study described in subparagraph (A)(i) of this paragraph and is performing related work under appropriate direction or guidance to qualify the employee as a professional employee described in subparagraph (A) of this paragraph;"

5 U.S.C. § 7112(b) prevents professionals from being included in a unit with nonprofessional employees "unless a majority of the professional employees vote for inclusion in the unit." See, Department of Defense, U.S. MEPCOM, Headquarters, Western Sector, Oakland Army Base and AFGE, 5 FLRA 3 (1980).

The professional will consider two matters when she votes in the secret ballot representation election. The first is whether or not she desires to be part of the proposed bargaining unit with nonprofessional employees. The second is whether she wants to be represented by one of the unions on the ballot. *Id.*, at 6.

5. Work directly affecting national security.

Although the President has authority to exclude organizations from the coverage of the statute for national security reasons, authority to exclude a particular individual engaged in national security work is vested in the Authority. 5 U.S.C. § 7112(b)(6). With respect to national security exclusions, there is no need to establish that the employee is primarily engaged in such work. DOE, Oak Ridge, 4 FLRA 627 (1980); Defense Mapping Agency, West Warwick, Rhode Island and AFGE, 13 FLRA 128 (1983). 5 U.S.C. § 7112(b)(6) is not limited to individuals primarily engaged in National Security work. The test is (1) the individual employee is engaged in the designated work, and (2) the work affects national security. The Authority indicated an intent to narrowly interpret the term "national security" to include "only those sensitive activities of government that are directly related to the protection and preservation of the military, economic, and productive strength of the United States. . ." Oak Ridge, 4 FLRA at 655-656.

In Department of the Navy, U.S. Naval Station, Panama and AFSCME, 7 FLRA 489 (1981) the Authority held that a Classified Material Systems Custodian should be excluded because he reviews and logs in all classified material. The fact that he handles highly classified communications directly affecting national security was a sufficient basis for excluding him from the unit.

6. Employees Engaged in Internal Security.

The Authority may also exclude employees who investigate and audit others whose duties affect the internal security of the agency. 5 U.S.C. § 7112(b)(7). The language of section 7112(b)(7) requires that only employees "primarily" engaged in investigating and auditing employees whose work directly affects the internal security of an agency are to be excluded from units. DOL, Office of the Inspector General, Boston, 7 FLRA 834 (1981).

e. Other Excluded or Distinguished Employees. There are other classes of employees who are excluded or distinguished from the bargaining unit employees. See 5 U.S.C. § 7112(b). Though normally excluded, intermittent employees, who are otherwise eligible for union membership, and who have a reasonable expectation of continued employment, may be included in a prospective bargaining unit. Ft. Buchanan Installation, Club Management System, 9 FLRA 143 (1982).

2-8. The Representation Election.

a. General.

5 U.S.C. § 7111(a).

An agency shall accord exclusive recognition to a labor organization if the organization has been selected as the representative, in a secret ballot election, by a majority of the employees in an appropriate unit who cast valid ballots in the election.

1. The election is conducted by the agency under the supervision of the Regional Director. The parties will agree as to the conduct of the election or, where they cannot agree, the Regional Director will dictate the procedures to be followed. Matters often addressed in the "consent agreement" are: the procedures to be used for challenged ballots, provisions for observers, period for posting the "notice of election," procedures for checking the eligibility list and for mail balloting, positions on the ballot, custody of the ballots, runoff procedures, and wording on the ballot.

2. Each party will be designated an equal number of observers who are to insure the election is conducted fairly, the integrity of the secret ballot is maintained, and all eligible voters are given the opportunity to vote.

3. Note that merely a majority of the valid votes cast (not a majority of employees in the unit) is needed by the labor organization to win as the exclusive representative. See Department of Interior, 34 FLRA 67 (1989) (only 3 of 17 eligible voters actually cast ballots, yet the union was certified as the exclusive representative).

b. Results of the Election.

1. Certification. (5 C.F.R. § 2422.32). If a union receives a majority of the votes cast, it is certified as the bargaining representative for the unit of employees. If the union loses the election, a certification of results is issued by the Regional Director.

2. Runoff Elections (5 C.F.R. § 2422.28). A runoff election will be conducted when there were at least three choices on the ballot, *i.e.*, at least two unions and a "neither" or "none," and no choice received a majority of the votes. The election will be between the choices who received the highest and second highest number of votes in the original election.

3. Inconclusive Election (5 C.F.R. § 2422.29). An inconclusive election is one in which no choices received a majority of the votes, and there are at least three choices. A new election is held when all choices received the same number of votes, or two received the same number of votes and the third received more but not a majority; or, in a runoff election, both selections received the same number of votes.

2-9. Objections to Elections and Challenged Ballots; Neutrality Doctrine.

a. Procedures (5 C.F.R. § 2422.26).

1. A dissatisfied party (normally a union which loses an election) may file an objection to the election within five days after the tally of ballots has been furnished, seeking a new election. The objection may be to the procedural conduct of the election or to conduct which may have improperly affected the results of the election. The objections must be specific, not conclusionary. Within ten days after filing the objection, the objecting party shall file with the Regional Director statements, documents and other materials supporting the objections.

Failure to file the objections within five days will result in a denial of the application for review. In Department of Veterans Affairs, Chattanooga National Cemetery and AFGE, 45 FLRA 263 (1992), the activity filed objections to an election seven days after the tally of votes. The application for review was denied.

2. The Regional Director conducts an investigation. The facts are gathered, arguments heard, and a decision made whether to sustain the objections and order a new election, overrule the objections, or, if a substantial issue exists which cannot be summarily resolved, to issue a notice of Hearing on Objections.

3. The Hearing on Objections is held before an Administrative Law Judge (ALJ) with the objecting party bearing the burden of proof. All necessary witnesses are considered in a duty status. The ALJ files a report and recommendations with the Authority.

In the following case, several employees filed an objection to the election.

DEPARTMENT OF VETERANS AFFAIRS JOHN J. PERSHING MEDICAL CENTER, POPLAR BLUFF, MISSOURI and AFGE 45 FLRA 326 (1992)

(Extract)

I. Statement of the Case

This case is before the Authority on an application for review filed by three employees under section 2422.17(a) of the Authority's Rules and Regulations. The employees seek review of the Acting Regional Director's (ARD) report and findings dismissing their objection to the conduct of a representation election. Neither the Activity nor the Petitioner filed an opposition to the employees' application.

For the following reasons, we deny the application for review.

II. Background and Regional Director's Decision

The ARD conducted a mail ballot election in a unit of five employees. The ARD received and counted two ballots, which were cast for the Union. No additional ballots were received by the ARD. Subsequently, the ARD received a letter from three employees, James E. Akers, Dennis R. Fowler, and Charles E. Moon, who asserted that they voted against Union representation and mailed their ballots according to the election requirements. They requested the ARD to rerun the election.

The ARD construed the employees' letter as an objection to the procedural conduct of the election. However, the ARD found that none of the employees was a party to the case and concluded that none had standing to object to the conduct of the election. Accordingly, the ARD dismissed the objection.

III. Application for Review

Employees Akers, Fowler, and Moon argue that they properly and timely mailed their ballots casting votes against Union representation. They assert that the election should not stand because it "does not represent the wishes of the majority." Application at 1.

IV. Analysis and Conclusions

We conclude, for the following reasons, that no compelling reasons exist within the meaning of section 2422.17(c) of the Authority's Rules and Regulations for granting the application for review.

Section 2422.[31] of the Authority's Rules and Regulations provides, in pertinent part, that a "party" may object to the conduct of an election. As relevant here, "party" is defined in section 2421.11(a) as a person: (1) filing or named in a charge, petition, or request; or (2) whose intervention in a proceeding has been permitted or directed by the Authority.

We find no compelling reasons to review the ARD's determination that none of the employees is a party to this case. It is undisputed that, as found by the ARD, none of the employees: was a party in the filing of the original representation petition in this case; none were granted intervention at any time; none participated in the election arrangements or signed, either individually or on behalf of other employees, the Election Agreement in this case. ARD Report at 3.

As review of the ARD's finding that none of the employees is a party is not warranted, review of the ARD's dismissal of the objection to the election also is not warranted. For example, General Services Administration Regional Office, Region 4, 2 Rulings on Requests for Review of the Assistant Secretary 379 (1976) (finding employees did not have standing, individually or collectively, to file objections to an election); Clarence E. Clapp, 279 NLRB 330 (1986) (in dismissing objection to election filed by eligible voter, the National Labor Relations Board noted that it "has long held that individual employees are not 'parties' within the definition of 'party'" in the Board's regulations).

The employees have not demonstrated that review of the ARD's decision is warranted under the standards set forth in section 2422.17(c) of the Authority's Rules and Regulations. Accordingly, we will deny the application for review.

b. Improper Management Conduct [The Neutrality Doctrine, 5 U.S.C. §§ 7102, 7116(a)(1), (2) and (3)]

1. Agency supervisors and managers are required to adhere to a position of neutrality concerning the employees' selection of a bargaining representative. Agencies may not become involved in the pros and cons of the selection of a bargaining representative nor which particular labor organization should be chosen.

2. Employees have a right to reject a labor organization and have a right to espouse their opposition. This fact is the basis for the inclusion of the "No," "None" or "Neither" choice on the ballot.

3. The restriction on the agency's right to become involved in the employees' selection of a bargaining representative does not mean that the agency is restricted from urging all employees to participate in the election. A program designed to provide maximum employee participation in the election through the use of posters, employee bulletins, loud speakers, or any other device is not only proper, but may be construed as an obligation of agency management. Agencies should be concerned with the

maximum exercise of the franchise by employees to insure that, regardless of the outcome of the election, it reflects the choice of all or an optimum number of employees. See Labor Relations Bulletin No. 219 (DA, DCSPER, 8 Oct 85).

4. The campaigns conducted by participating labor organizations should be free from any management involvement. There are instances in which management may become involved. Section 7116(e) provides:

"The expression of any personal view, argument, opinion or the making of any statement which--

"(1) publicizes the fact of a representational election and encourages employees to exercise their right to vote in such election,

"(2) corrects the record with respect to any false or misleading statement made by any person, or

"(3) informs employees of the Government's policy relating to labor-management relations and representation,

shall not, if the expression contains no threat of reprisal or force or promise of benefit or was not made under coercive conditions, (A) constitute an unfair labor practice under any provision of this chapter, or (B) constitute grounds for the setting aside of any election conducted under any provisions of this chapter.

It may become necessary to police the electioneering material because it is scurrilous, inflammatory, or libelous. Where the agency is the subject of attack, it may become necessary in some extreme and rare instances to respond. However, such response should be confined to establishing the facts and not engaging in a partisan campaign. Any response should be considered carefully to insure that it is not a partisan approach; is designed solely to protect the image of the agency or to correct scurrilous, libelous, or inflammatory matters; and is not designed to oppose any of the labor organizations, urge a "No" vote, or exhibit favoritism to any of the labor organizations. Where the agency goes beyond this, as it did in Air Force Plant Representative Office, 5 FLRA 492 (1981), it may violate 5 U.S.C. § 7116(a)(1). In that case, the activity posted and distributed, shortly before a scheduled election, a "message implying that unions were unnecessary, undesirable, and difficult to remove once the employees voted in favor of exclusive recognition." Nevertheless, the activity spokesman may be critical of the union in the process of correcting the record, so long as the corrections are noncoercive, and do not threaten or promise benefits. AANG, Tucson and AFGE, Local 2924, 18 FLRA 583 (1985).

5. Department of the Army committed an unfair labor practice (ULP) by assisting a challenging union (Teamsters) prior to an election at Fort Sill, Oklahoma.

DA, Fort Sill, Oklahoma, 29 FLRA 1110 (1987). In that case, DA officials, White House officials and Teamsters' representatives held a meeting in Washington, D.C., shortly before an election at Fort Sill prompted by the Teamsters challenge to the incumbent union (NFFE) for representation of a 2,500 member bargaining unit. The parties met to discuss the commercial activities program at Fort Sill. The Teamsters subsequently publicized this meeting in flyers distributed to bargaining unit members prior to the election. After the election, won by the Teamsters, NFFE filed a ULP against the Army for a breach of neutrality. The authority ultimately agreed, finding that the meeting interfered with employees' rights to freely choose their exclusive representative, and that the flyer distribution interfered with the conduct of a fair election. As a remedy the Authority ordered a new election.

6. Violations of campaign ground rules governing electioneering will not, as a general rule, be considered as a basis for objections to the election. The question to be considered in objections is not whether the agreement has been violated, but whether the alleged objectionable conduct "had an independent improper effect on the conduct of an election or the results of the election." It should be noted that an electioneering agreement may not restrain employees in the exercise of their rights under the statute.

In Department of the Navy, Naval Station Ingleside, Texas and NFFE, 46 FLRA 1011 (1992) the activity and the two rival unions entered into an Agreement for Consent Election. No one received a majority of the votes cast and one of the unions filed six objections to the election. The Regional Director found the objection to be without merit and dismissed them. The Authority affirmed. The issue was whether the alleged conduct interfered with the employees right to free choice or improperly affected the outcome of the election. The agency had investigated any complaints made prior to the election and had taken corrective action. This made it much easier for the Authority to find that any objectional conduct was isolated and did not affect the outcome of the election.

7. Because supervisors and managerial employees are considered part of agency management, any action of a supervisor or managerial employee becomes the action of the agency. As such, supervisors and managerial employees must be made aware of their responsibilities in election campaigns. However, it is important to distinguish between management and supervisors and actions of other employees. In Department of Justice, Immigration and Naturalization Service, 9 FLRA 253 (1982), a Border Patrol Academy instructor made statements to his students favoring the International Brotherhood of Police Officers over AFGE. This occurred during a representation election campaign. The Authority disagreed with the ALJ and dismissed this portion of a ULP complaint. "Although § 7116(e) limits the types of statements that may be made by agency management during an election campaign, § 7102 protects the expression of personal views by employees during an election campaign." (Emphasis added.)

8. Unions with "equal status" must be given equivalent solicitation rights, whereas those with lower status normally are not given equivalent solicitation rights. The problem is defining the status of unions and, secondly, what equivalent solicitation rights are. See Gallup Indian Medical Center, Gallup, New Mexico, 44 FLRA 217 (1992), for a discussion of equivalent status and the rights associated with such status.

The incumbent exclusive representative, if there is one, will already have access to employees and may have negotiated in the collective bargaining agreement for the use of agency services and facilities such as an office, a telephone, and use of management distribution systems. The "no status" union is one which does not have a formal relationship with the unit employees. As discussed previously, management is not required to allow it on the installation to solicit employees. The exception would be if the union can make an affirmative showing that it cannot effectively contact the employees off the installation (See Barksdale Air Force Base).

Once the Regional Director notifies the parties that a notice of petition will be posted, the union is elevated to a higher status. DOD and Education Association of Panama, 44 FLRA 419 (1992). Management should give it some limited access to the employees. If an exclusive representative already represents the petitioned for employees, it is deemed to be a party to the election automatically (as discussed previously). The incumbent must be afforded the same access rights as the petitioning union, plus it will have its negotiated rights to services and facilities. Clearly, the challenging union even if it has achieved equivalent status, is only entitled to "customary and routine" facilities. Section 7116(a)(3). If the incumbent has successfully negotiated the use of a building on the installation, for example, management is not required to provide a similar facility to the challenger. U.S. Army Air Defense Center, Fort Bliss, Texas, 29 FLRA 362 (1987).

See Pierce, The Neutrality Doctrine in Federal Sector Labor Relations, The Army Lawyer, July 1983, at 18, for a detailed discussion of the neutrality doctrine.

c. Challenged Ballots (5 C.F.R. § 2422.24).

1. Either party may challenge ballots; i.e., the right of an employee to vote. For instance, it may be alleged that an employee is not in the bargaining unit or is a supervisor. The challenged ballots are set aside and if the result of the count is so close that the challenged ballots could affect the outcome of the election, the Regional Director will investigate. If there is no relevant question of fact, the Regional Director will issue a report and findings, which may be appealed to the Authority.

2. If a question of fact exists, a hearing will be ordered and a decision made by an administrative law judge. This decision will be sent to the Authority, who will provide the final decision.

3. If the Regional Director determines that a substantial question of interpretation or policy exists, the case will be transferred to the Authority for a decision.

2-10. Purposes of Petitions [5 C.F.R. § 2422.1].

NOTE: In 1996, the FLRA amended its rules relating to Representation Proceedings. The new rules provide for one type of petition where the party describes the purpose for the petition. Previously, the FLRA had numerous types of petitions, each with a single function. These new rules, amending 5 CFR parts 2421, 2422 and 2429, were effective 15 March 1996.

Petition forms may be obtained from the Regional Office. The completed form is sent, with the supporting documents, to the FLRA Regional Office. Other purposes for petitions include:

a. An election to determine if employees in a unit no longer wish to be represented . . . by an exclusive representative. (Formerly known as a Decertification or DR Petition).

The petition is filed by one or more employees or by an individual filing on their behalf. It requires an election to determine if an incumbent union should lose its exclusive representative status because it no longer represents a majority of employees in an existing union.

A decertification election must ordinarily be in the same unit as was certified. The petition must be accompanied by a showing of interest of not less than thirty percent of the employees indicating that the employees no longer desire to be represented by the currently recognized labor organization (5 C.F.R. § 2422.1(a)(2)).

The petition is subject to the timeliness requirements of 5 C.F.R. 2422.12. The election bar rule applies in those cases in which a union has been decertified and a petition for an election has been filed within 12 months of the decertification election.

See Sacramento Army Depot and Michael M. Burnett, 49 FLRA 1648 (1994)(the Authority refused to order an election because the showing of interest did not clearly indicate a desire to decertify the union).

b. To Clarify or Amend a Recognition or Certification Then in Effect or Any Other Matter Relating to Representation. 5 CFR § 2422.1(b).

NOTE: The following discussion includes the old petitions types as a vehicle to discuss the purposes for which a petition may be filed. Some of

discussion concerning the limitations of the various petitions is no longer valid. One of the main purposes for the new rules was to simplify the process and elevate substance over form.

An agency or activity may file a petition (formerly an Agency or RA Petition) seeking a determination whether an incumbent union should cease to be the exclusive representative when it has a "good faith doubt" that the union currently represents a majority of the employees in the bargaining unit; or that, because of a substantial change in the character and scope of the unit, it has a "good faith doubt" that the unit is now appropriate. 5 C.F.R. 2422.2(b)(1). See MWR Directorate, Marine Corps Air Station Cherry Point and AFGE, 45 FLRA 281 (1992); Department of Energy, 3 FLRA 76 (1980). An RA petition can be filed at "any time when unusual circumstances exist which substantially affect the unit or the majority representation." 5 C.F.R. § 2422.3(d)(3). In 4787th Air Base Group and AFGE, 15 FLRA 858 (1984), management established its good faith doubt that the union represented a majority of the employees in the existing unit.

Reorganizations within governmental agencies frequently cause management to doubt the appropriateness of bargaining units which existed prior to the changes in organization. For a reorganization case in which an RA petition was used, see MWR Directorate, Cherry Point, North Carolina and AFGE, 45 FLRA 281 (1992).

A petition to clarify a unit (formerly a Unit Clarification or CU Petition) is filed when a change has occurred in the unit composition as the result of a reorganization or the addition of new functions to a previously recognized unit. Its purpose is to clarify what the bargaining unit is and what employees are in it. It may be filed by an agency or a labor organization. Because of the statutory changes in definitions of supervisors and management officials and because of reorganizations and transfers of functions, this is one of the most common representation petitions filed under the statute. A common example of the use of a CU petition is to determine whether an employee is in one of the categories excluded by 5 U.S.C. § 7112(b), such as a supervisor or manager. If so, the employee is not in a bargaining unit. See e.g., Department of Agriculture, Forest Service, Chattahoochee-Oconee National Forests, Oconee Ranger Station, 43 FLRA 911 (1991); Norfolk Naval Shipyard, Portsmouth Virginia, 47 FLRA 129 (1993).

A good case describing the rules and rationale the FLRA will apply in evaluating unit clarification petitions is FAA and AFGE, 15 FLRA 60 (1984).

A petition may be filed to conform the recognition to existing circumstances resulting from nominal or technical changes, such as a change in the name of the union or in the name or location of the agency or activity. (Formerly an Amendment of Recognition or Certification Petition or AC Petition). Like a CU petition, an AC petition may be filed at any time because it does not raise a question concerning

representation. The petitioner merely wants to update the identity of the parties to the exclusive relationship. For example, in a combined CU/AC case, the Authority changed the existing recognition to reflect the fact that the Civil Service Commission had been superseded by the Office of Personnel Management. OPM, 5 FLRA 238 (1981). For other examples of the use of AC petitions see Department of the Army, Rock Island Arsenal, 46 FLRA 76 (1992); Department of Health and Human Services, Administration for Children and Families, 47 FLRA 247 (1993)

c. Petition for Consolidation (formerly a UC Petition). 5 CFR § 2422.1(c).

An agency or exclusive representative may file a consolidation petition to consolidate previously existing bargaining units. There is a presumption favoring consolidation. See VA, 2 FLRA 224 (1979). Before such a petition can be filed with the Authority, the party seeking such a consolidation must first serve a written request for consolidation on the other party. If the latter rejects that proposed consolidation or fails to respond within 30 days, the initiating party may file a UC petition with the Regional Director. If the parties agree to consolidate, they may jointly or individually file a UC petition. The petitioner(s) must indicate whether or not an election on the proposed consolidation is desired. Even if the parties agree to consolidate without an election, an election will be held if, after affected employees are given a 10-day notice of the proposed consolidation, 30% of the employees indicate that they desire an election. An election is required if the petition entails the consolidating of units of professional employees with units of non-professional employees. 5 U.S.C. § 7112(b)(5).

Once a union is certified as the exclusive representative of a consolidated unit, a new bargaining obligation is created that supersedes bargaining obligations that existed prior to the consolidation. HHS, SSA, 6 FLRA 202 (1981).

The criteria for determining whether to determine if the consolidated unit is appropriate are community of interest, and effective dealings and efficiency of agency operations. Compare Department of the Navy, U.S. Marine Corps, 8 FLRA 15 (1982)(ordering consolidation of 22 units within the Marine Corps) with U.S. Army Training and Doctrine Command, 11 FLRA 105 (1983)(finding consolidation of 11 units inappropriate).

Recognition for the purpose of negotiating a dues allotment agreement was one of two new forms of recognition created by the FSLMRS. 5 C.F.R. § 2422.(a)(1)(ii) provides for filing a petition for such recognition (formerly known as a DA Petition). The unit petitioned for must satisfy the same criteria of appropriateness as a unit for which a union seeks exclusive recognition. However, unlike the 30% showing of interest requirement attaching to RO petitions, the union filing a DA petition must show that 10% of the employees in the proposed unit are

members of the petitioning union. 5 C.F.R. § 2422.3(d). There can be no dues allotment recognition for a unit for which a union holds exclusive recognition.

d. National consultation rights (NCR petition). Requests for NCR are made directly to the agency or the primary national subdivision (PNS). If the agency/PNS grants such recognition, no further proceedings are necessary: there is no need for FLRA to "certify" that the union is entitled to NCR recognition. However, should the union wish to challenge the agency's determination that the union does not qualify for NCR, it can file an NCR petition with the Authority in accordance with the requirements of 5 C.F.R. § 2426.2.

e. Consultation rights on government-wide rules or regulations (CR petition). Requests for CR, like those for NCR, are made directly to the agency that issues government-wide rules or regulations. Should the agency not grant such recognition, the union may file a CR petition with the Authority in accordance with the requirements of 5 C.F.R. § 2426.12.

CHAPTER 3

COLLECTIVE BARGAINING

3-1. Introduction.

a. Collective Bargaining.

Once certified as an exclusive representative, the union will want to negotiate a collective bargaining agreement (CBA). A CBA is a contract negotiated by representatives of management and the exclusive representative. The contract is binding upon all parties: management, union, and employees. It signifies that management and the union have agreed upon terms and conditions of employment for employees in the bargaining unit.

b. Typical Clauses Contained in Bargaining Agreements.

While there is wide variation in the number, size, and wording of contract clauses, there are some similarities in their scope and content. The following examples illustrate a few matters frequently contained in agreements negotiated in the federal government. Of course, a CBA addresses many more matters. These are included merely to familiarize a reader who has never seen one with matters that they contain.

Parties. The first clause appearing in most collective bargaining agreements identifies the parties to the contract. For the union, the agreement may be signed by representatives of the national union, the local union or both. Management may prefer that both the national and the local unions sign so that both may be liable for contract violations. The agency may sign as a single employer or as a group representative of several government employers.

Recognition and Scope. In most contracts, an acknowledgment is included that the union is the exclusive and sole collective bargaining agent for all employees in the unit.

Management Rights. A statement of management rights is contained in contracts. This clause delineates the areas reserved solely to management by law. Management rights will be discussed in greater detail later in this chapter.

Grievance and Arbitration. All agreements must include a negotiated grievance procedure, applicable only to the bargaining unit. The parties to the agreement negotiate the scope and coverage of the negotiated grievance procedure.

c. Negotiation of the Collective Bargaining Agreement.

Most installations have negotiation teams which consist of management personnel from the various installation staffs. Often the judge advocate labor counselor is a member of the negotiation team. Even if not a member, the labor counselor is frequently called upon to render legal opinions concerning the requirement of management to negotiate various union proposals. The union will normally submit its proposals to management prior to negotiating. The team will discuss them and decide their positions with respect to each proposal. They may agree to some, others they will not agree to as proposed, others may be acceptable and they will agree to them if it becomes advantageous during the "give and take" of negotiations, and others they may feel are nonnegotiable and so won't discussed.

The subject matter of the first session with the union will be the establishment of the ground rules for the negotiations. This may include agreeing upon the time, date, and place of negotiations; whether or not the session will be open or closed; the order of business, who will be on the negotiation teams and who will be spokespersons; how often proposals will be tabled before impasse procedures are utilized; and whether the contract will be implemented while negotiability disputes are being decided by third parties. After the ground rules are agreed upon, the parties generally complete a memorandum of understanding (MOU) containing the provisions.

The parties then negotiate over their proposals and counter proposals. Neither side need agree to a proposal, but each must discuss it in good faith unless it falls outside the scope of bargaining. Section 7114(b) provides:

(b) The duty of any agency and an exclusive representative to negotiate in good faith under subsection (a) of this section shall include the obligation--

(1) to approach the negotiations with a sincere resolve to reach a collective bargaining agreement;

(2) to be represented at the negotiations by duly authorized representatives prepared to discuss and negotiate on any condition of employment;

(3) to meet at reasonable times and convenient places as frequently as may be necessary, and to avoid unnecessary delays;

(4) in the case of an agency, to furnish to the exclusive representative involved, or its authorized representative, upon request and, to the extent not prohibited by law, data--

(A) which is normally maintained by the agency in the regular course of business;

(B) which is reasonably available and necessary for full and proper discussion, understanding, and negotiation of subjects within the scope of collective bargaining; and

(C) which does not constitute guidance, advice, counsel, or training provided for management officials or supervisors, relating to collective bargaining; and

(5) if agreement is reached, to execute on the request of any party to the negotiation a written document embodying the agreed terms, and to take such steps as are necessary to implement such agreement.

Section 7103(a)(12) further defines collective bargaining as:

. . . the performance of the mutual obligation of the representative of an agency and the exclusive representative of employees in an appropriate unit in the agency to meet at reasonable times and to consult and bargain in a good faith effort to reach agreement with respect to the conditions of employment affecting such employees and to execute, if requested by either party, a written document incorporating any collective bargaining agreement reached, but the obligation referred to in this paragraph does not compel either party to agree to a proposal or to make a concession (emphasis added).

The Federal Sector Labor-Management Relations Statute (FSLMRS), 5 U.S.C. §§ 7101-7135, imposes upon both unions and employers the obligation to bargain in good faith concerning conditions of employment. This obligation persists throughout the period of exclusive representation, not just when a collective bargaining agreement is being negotiated or renegotiated. Thus, if management wants to change a condition of employment, such as the working hours, it must give the unions notice of the projected change and an opportunity to negotiate. This is addressed in more detail later in this chapter.

d. Official time, travel and per diem for union negotiators.

5 U.S.C. § 7131 clearly provides that employees representing an exclusive representative in the negotiation of a collective bargaining agreement and other representational functions shall be authorized official time. That is, time away from their normal job, to accomplish these functions. Functions for which official time have been

mandated by the FLRA include, but are not limited to: negotiating a collective bargaining agreement, impasse proceedings, midterm and impact and implementation negotiations, grievance proceedings and EEO complaints. Employees negotiating local supplements to national master agreements are also entitled to official time. American Federation of Government Employees v. Federal Labor Relations Authority, 750 F.2d 143 (D.C. Cir. 1984).

Activities performed by employees relating to internal union business of a labor organization shall be performed during the time the employee is in a non-duty status. Internal union business, under section 7131, is construed to include little more than solicitation of union membership, election of labor organization officials, and collection of union dues. Also, official time may not be granted an employee during other than normal duty hours. This means that no overtime will be paid to allow employees to perform representational activities, because the FSLMRS limits official time to those times the employee would otherwise be in a duty status. Finally, official time may not be allowed for employees outside the bargaining unit for which a CBA is being negotiated. National Oceanic and Atmospheric Administration, 15 FLRA 43 (1984); AFGE v. FLRA, 744 F.2d 73 (10th Cir. 1984).

One area of dispute is over which employees are covered by Section 7131(a). The statute defines those covered as "any employee representing an exclusive representative in the negotiation of a collective bargaining agreement" Understandably, unions have attempted to expand the categories of employees covered. In Naval Surface Weapons Center, 9 FLRA 193 (1982), reconsidered, 12 FLRA 731 (1983), aff'd, AFGE, Local 2090 v. FLRA, 738 F.2d 633 (4th Cir. 1984), the union was the exclusive representative at two separate activities located at the Naval Center in Dahlgren, Virginia. The two activities, U.S. Naval Space Surveillance Systems (USNSSS) and U.S. Naval Surface Weapons Center (Weapons Center), held separate contract negotiations with the union. In a negotiation with USNSSS, the union Executive Vice President, an employee of the Weapons Center, served as Chief Negotiator.

USNSSS refused to grant to the union representative official time during the collective bargaining negotiations, arguing the representative was not a bargaining unit employee. The FLRA agreed with USNSSS, denying the union representative official time. The FLRA determined the official time entitlement under section 7131(a) accrues only to an employee who is within the bargaining unit involved in the negotiation. The union challenged the decision in the Court of Appeals for the Fourth Circuit, asserting that under Section 7131(a), any employee representing the union was entitled to official time. Seizing on the work "any," the union claimed the union representative was entitled to official time, even though he was not a bargaining unit employee. The court, however, affirmed the decision and reasoning of the FLRA. An employee is only entitled to official time if he is a member of the bargaining unit he is negotiating for and an employee of the agency he is negotiating with.

In HHS, Social Security Administration, 46 FLRA 1118 (1993), the agency challenged an arbitrator's decision granting union representatives official time for attendance at a national conference. The arbitrator granted official time for convention activities that were related to general labor relations matters. The FLRA upheld the arbitrator's decision, finding union officials attendance in meetings regarding general labor relations matters was not internal union business but representational activities. Consequently, official time was authorized for some of the activities at the convention.

Section 7131(a) equalizes the number of union negotiators on official time to the same number of management negotiators. In the Authority's judgment, however, this section does not absolutely limit the union to the same number of negotiators, but in fact allows them to bargain for additional negotiators on official time. Such bargaining is allowed because, according to the FLRA, section 7131(d) expressly provides that official time must be granted by an agency for any employee representing a union in any amount the parties agree to be reasonable, necessary, and in the public interest. EPA and AFGE, 15 FLRA 461 (1984). The Office of Personnel Management (OPM) and Department of the Army did not agree with this holding or its rationale. OPM's position was set forth in FPM Bulletin 711-93, December 19, 1984, SUBJECT: Negotiability of Number of Union Negotiators on Official Time [the FPM was sunset on 31 Dec. 1993, including this letter], and it cites AFGE Local 2090 v. FLRA, 738 F.2d 633 (4th Cir. 1984) in support of its view. In this case, the Fourth Circuit held that section 7131(a) (b) and (c) deal with official time for employee contract negotiators, while section 7131(d) allows the employer to negotiate for other types of official time allowances (e.g. grievance processing or investigation).

OPM also required that employers record the time and cost involved in employee representational functions. FPM Letter 711-161, July 31, 1981, SUBJECT: Recording the Use of Official Time by Union and Other Employee Representatives for Representational Functions [the FPM was sunset on 31 Dec 1993, including this letter] required agencies to initiate methods to record or account for the use of official time. The purpose of this requirement was to record travel and per diem costs when payable, assess the impact on agency operations of official time, and to determine changes that should be sought concerning official time in future negotiated contracts. While agencies cannot intimidate, harass or take other adverse action against a union representative for their use of official time to perform representational functions, agencies can and should monitor the use of official time to insure it is only being granted for proper purposes. Defense General Supply Center, 15 FLRA 932 (1984); Air Force Logistics Command, 14 FLRA 311 (1984).

Policies provided for in the FPM prior to sunset may now appear in agency regulations.

The FLRA had always maintained that employees on official time away from their normal place of duty were entitled to payment of travel and per diem because labor-management negotiations qualify as "official business" within the meaning of the Travel

Expense Act, 5 U.S.C. § 5702. This position was unanimously rejected by the Supreme Court in the following case.

**BUREAU OF ALCOHOL, TOBACCO AND FIREARMS, PETITIONER v.
FEDERAL LABOR RELATIONS AUTHORITY ET AL.**

464 U.S. 89, 104 S. Ct. 439, 78 L.Ed. 2d 195 (1983)

JUSTICE BRENNAN delivered the opinion of the Court.

Title VII of the Civil Service Reform Act of 1978 ("Act"), Pub. L. No. 95-454, 92 Stat. 1111, 5 U.S.C. § 7131(a), requires federal agencies to grant "official time" to employees representing their union in collective bargaining with the agencies. The grant of official time allows the employee negotiators to be paid as if they were at work, whenever they bargain during hours they would otherwise be on duty. The Federal Labor Relations Authority ("FLRA" or "Authority") concluded that the grant of official time also entitles employee union representatives to a per diem allowance and reimbursement for travel expenses incurred in connection with collective bargaining. 2 FLRA 265 (1979). In this case, the Court of Appeals for the Ninth Circuit enforced an FLRA order requiring an agency to pay a union negotiator travel expenses and a per diem, finding the Authority's interpretation of the statute "reasonably defensible." 672 F.2d 732 (1982). Three other Courts of Appeals have rejected the FLRA's construction of the Act.¹ We granted certiorari to resolve this conflict, 459 U.S. ____ (1983), and now reverse.

I
A

Title VII of the Civil Service Reform Act, part of a comprehensive revision of the laws governing the rights and obligations of civil servants, contains the first statutory scheme governing labor relations between federal agencies and their employees. Prior to enactment of Title VII, labor-management relations in the federal sector were governed by a program established in a 1962 Executive Order.² The Executive Order regime, under which federal employees had limited rights to engage in

¹ Florida National Guard v. FLRA, 699 F.2d 1082 (11th Cir. 1983), cert. pending, No. 82-1970; United States Department of Agriculture v. FLRA, 691 F.2d 1242 (8th Cir. 1982), cert. pending, No. 82-979; Division of Military & Naval Affairs v. FLRA, 683 F.2d 45 (2d Cir. 1982), cert. pending, No. 82-1021.

² Exec. Order No. 10988, 3 C.F.R. § 521 (1959-1963 Comp.). The Executive Order program was revised and continued by Exec. Order No. 11491, 3 C.F.R. 861 (1966-1970 Comp.), as amended by Exec. Orders Nos. 11616, 11636, and 11838, 3 C.F.R. §§ 605, 634 (1971-1975 Comp.) and 3 C.F.R. § 957 (1971-1975 Comp.).

concerted activity, was most recently administered by the Federal Labor Relations Council, a body composed of three Executive Branch management officials whose decisions were not subject to judicial review.³

The new Act, declaring that "labor organizations and collective bargaining in the civil service are in the public interest," 5 U.S.C. § 7101(a), significantly strengthened the position of public employee unions while carefully preserving the ability of federal managers to maintain "an effective and efficient Government," § 7101(b).⁴ Title VII expressly protects the rights of federal employees "to form, join, or assist any labor organization, or to refrain from any such activity," § 7102, and imposes on federal agencies and labor organizations a duty to bargain collectively in good faith, § 7116(a)(5) and (b)(5). The Act excludes certain management prerogatives from the scope of negotiations, although an agency must bargain over the procedures by which these management rights are exercised. See § 7106. In general, unions and federal agencies must negotiate over terms and conditions of employment, unless a bargaining proposal is inconsistent with existing federal law, rule, or regulation. See §§ 7103(a), 7114, 7116, and 7117(a). Strikes and certain other forms of concerted activities by federal employees are illegal and constitute unfair labor practices under the Act, § 7116(b)(7)(A).

The Act replaced the management-controlled Federal Labor Relations Council with the FLRA, a three-member independent and bipartisan body within the Executive Branch with responsibility for supervising the collective-bargaining process and administering other aspects of federal labor relations established by Title VII. § 7104. The Authority, the role of which in the public sector is analogous to that of the National Labor Relations Board in the private sector, see H.R. Rep. No. 95-1403, p. 41 (1978), adjudicates negotiability disputes, unfair labor practice complaints, bargaining unit issues, arbitration exceptions, and conflicts over the conduct of representational elections. See § 7105(a)(2)(A)-(I). In addition to its adjudicatory functions, the Authority may engage in formal rulemaking, § 7134, and is specifically required to "provide leadership in establishing policies and guidance relating to matters" arising under the Act, § 7105(a)(1). The FLRA may seek enforcement of its adjudicatory orders in the United States Courts of Appeals, § 7123(b), and persons, including federal agencies, aggrieved by any final FLRA decision may also seek judicial review in those courts, § 7123(a).

³ The Council was established by Executive Order 11491 in 1970.

⁴ Certain federal employees, including members of the military and the Foreign Service, and certain federal agencies, including the Federal Bureau of Investigation and the Central Intelligence Agency, are excluded from the coverage of Title VII. 5 U.S.C. § 7102(a)(2) and (3).

B

Petitioner, the Bureau of Alcohol, Tobacco and Firearms ("BATF" or "Bureau"), an agency within the Department of the Treasury, maintained a regional office in Lodi, California. Respondent, the National Treasury Employees Union ("NTEU" or "Union") was the exclusive representative of BATF employees stationed in the Lodi office. In November 1978, the Bureau notified NTEU that it intended to move the Lodi office to Sacramento and to establish a reduced duty post at a new location in Lodi. The Union informed BATF that it wished to negotiate aspects of the move's impact on employees in the bargaining unit. As its agent for these negotiations, the Union designated Donald Pruett, a BATF employee and NTEU steward who lived in Madera, California and was stationed in Fresno. Bureau officials agreed to meet with Pruett at the new offices and discuss the planned move. Pruett asked that his participation in the discussions be classified as "official time" so that he could receive his regular salary while attending the meetings. The Bureau denied the request and directed Pruett to take either annual leave or leave without pay for the day of the meeting.

On February 23, 1979, Bureau officials met with Pruett at the proposed new Sacramento offices and inspected the physical amenities, including the restrooms, dining facilities, and parking areas. Pruett and the BATF officials then drove to Lodi where they conducted a similar inspection of the new reduced duty post. Finally, the group repaired to the existing Lodi office where they discussed the planned move. After Pruett expressed his general satisfaction with the new facilities, he negotiated with the agency officials about such matters as parking arrangements, employee assignments, and the possibility of excusing employee tardiness for the first week of operations in the Sacramento office. Once the parties reached an agreement on the move, Pruett drove back to his home in Madera.

Pruett had spent 11 and one half hours traveling to and attending the meetings, and had driven more than 300 miles in his own car. When he renewed his request to have his participation at the meetings classified as official time, the Bureau informed him that it did not reimburse employees for expenses incurred in negotiations and that it granted official time only for quarterly collective-bargaining sessions and not for mid-term discussions like those involved here. In June 1979, the Union filed an unfair labor practice charge with the FLRA, claiming that BATF had improperly compelled Pruett to take annual leave for the February 23 sessions.

While the charge was pending, the FLRA issued an "Interpretation and Guidance" of general applicability which required federal agencies to pay salaries, travel expenses, and per diem allowances to union representatives engaged in collective bargaining with the agencies.⁵ 2 FLRA 265 (1979). The Interpretation relied on § 7131(a) of the Act, which provides that "[a]ny employee representing an exclusive representative in the negotiation of a collective bargaining agreement . . . shall be authorized official time for such purposes. . ." The Authority concluded that an employee's entitlement to official time under this provision extends to "all negotiations between an exclusive representative and an agency, regardless of whether such negotiations pertain to the negotiation or renegotiation of a basic collective bargaining agreement." 2 FLRA, at 268. The Authority further determined that § 7131(a) requires agencies to pay a per diem allowance and travel expenses to employees representing their union in such negotiations. *Id.*, at 270.

Based on the NTEU's pending charge against the Bureau, the General Counsel of the Authority issued a complaint and notice of hearing, alleging that the BATF had committed an unfair labor practice by refusing to grant Pruett official time for the February 23 meetings.⁶ During the course of a subsequent hearing on the charge before an Administrative Law Judge, the complaint was amended to add a claim that, in addition to paying Pruett's salary for the day of the meetings, the BATF should have paid his travel expenses and a per diem allowance. Following the hearing, the ALJ determined that negotiations had in fact taken place between Pruett and BATF officials at the February 23 meetings. Bound to follow the recent FLRA Interpretation and Guidance,

⁵ Although the Authority invited interested persons to express their views prior to adoption of the Interpretation, see Notice Relating to Official Time, 44 Fed. Reg. 42,788 (July 20, 1979), the decision apparently was issued not under the FLRA's statutory power to promulgate regulations, § 7134, but rather under § 7105(a)(1), which requires the Authority to provide leadership in establishing policies and guidance relating to federal labor-management relations. See Brief for Respondent FLRA at 11 n. 10.

⁶ Section 7118 of the Act provides in part:

(a)(1) If any agency or labor organization is charged with having engaged in or engaging in an unfair labor practice, the General Counsel shall investigate the charge and may issue and cause to be served upon the agency or labor organization a complaint. . . .

The complaint issued by the General Counsel in this case relied on § 7116 of the Act, which provides in part:

(a) For the purposes of this chapter, it shall be an unfair labor practice for an agency—

(1) to interfere with, restrain, or coerce any employee in the exercise by the employee of any right under this chapter;

(8) to otherwise fail or refuse to comply with any provision of this chapter.

the ALJ concluded that the Bureau had committed an unfair labor practice by failing to comply with § 7131. Accordingly, he ordered the Bureau to pay Pruett his regular salary for the day in question, as well as his travel costs and a per diem allowance. The ALJ also required the BATF to post a notice stating that the agency would do the same for all employee union representatives in future negotiations. The Bureau filed exceptions to the decision with the Authority, which, in September 1980, affirmed the decision of the ALJ, adopting his findings, conclusions, and recommended relief. 4 FLRA 288 (1980).

The Bureau sought review in the United States Court of Appeals for the Ninth Circuit, and the Union intervened as a party in that appeal. The Bureau challenged both the FLRA's conclusion that § 7131(a) applies to mid-term negotiations and its determination that the section requires payment of travel expenses and a per diem allowance. After deciding that the Authority's construction of its enabling Act was entitled to deference if it was "reasoned and supportable," 672 F.2d at 735-736, the Court of Appeals enforced the Authority's order on both issues. *Id.*, at 737, 738. On certiorari to this Court, petitioner does not seek review of the holding with respect to mid-term negotiations. Only that aspect of the Court of Appeals' decision regarding travel expenses and per diem allowances is at issue here.

II

The FLRA order enforced by the Court of Appeals in this case was, as noted, premised on the Authority's earlier construction of § 7131(a) in its Interpretation and Guidance. Although we have not previously had occasion to consider an interpretation of the Civil Service Reform Act by the FLRA, we have often described the appropriate standard of judicial review in similar contexts.⁷ Like the National Labor Relations Board, see, e.g., NLRB v. Erie Resistor Corp., 373 U.S. 221, 236 (1963), the FLRA was intended to develop specialized expertise in its field of labor relations and to use that expertise to give content to the principles and goals set forth in the Act. See § 7105; H.R. Rep. No. 95-1403, p. 41 (1978). Consequently, the Authority is entitled to considerable deference when it exercises its "special function of applying the general provisions of the Act to the complexities" of federal labor relations. Cf., NLRB v. Erie Resistor

⁷ The decisions of the FLRA are subject to judicial review in accordance with the Administrative Procedure Act (APA), 5 U.S.C. § 706. See 5 U.S.C. § 7123(c). The APA requires a reviewing court to "decide all relevant questions of law, interpret constitutional and statutory provisions, and determine the meaning or applicability of the terms of an agency action." § 706. The court must set aside agency actions and conclusions found to be "arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law" or "in excess of statutory jurisdiction, authority, or limitations, or short of statutory right." § 706(2)(A) and (C).

Corp., *supra*, at 236. See also Ford Motor Co. v. NLRB, 441 U.S. 488, 496 (1979); NLRB v. Iron Workers, 434 U.S. 335, 350 (1978); NLRB v. Truck Drivers, 353 U.S. 87, 96 (1957).

On the other hand, the "deference owed to an expert tribunal cannot be allowed to slip into a judicial inertia which results in the unauthorized assumption by an agency of major policy decisions properly made by Congress." American Ship Building Co. v. NLRB, 380 U.S. 300, 318 (1965). Accordingly, while reviewing courts should uphold reasonable and defensible constructions of an agency's enabling Act, NLRB v. Iron Workers, *supra*, at 350, they must not "rubber-stamp . . . administrative decisions that they deem inconsistent with a statutory mandate or that frustrate the congressional policy underlying a statute." NLRB v. Brown, 380 U.S. 278, 291-292 (1965). See Allied Chemical & Alkali Workers v. Pittsburgh Plate Glass Co., 404 U.S. 157, 166 (1971).⁸ Guided by these principles, we turn to a consideration of the FLRA's construction of § 7131(a).

III

Section 7131(a) of the Civil Service Reform Act provides in full:

Any employee representing an exclusive representative in the negotiation of a collective bargaining agreement under this chapter shall be authorized official time for such purposes, including attendance at impasse proceeding, during the time the employee otherwise would be in a duty status. The number of employees for whom official time is authorized under this subsection shall not exceed the number of individuals designated as representing the agency for such purposes.

According to the House Committee that reported the bill containing § 7131, Congress used the term "official time" to mean "paid time." See H.R. Rep. No. 95-1403, p. 58 (1978). In light of this clear expression of congressional intent, the parties agree that employee union negotiators are entitled to their usual pay during collective-bargaining sessions that occur when the employee "otherwise would be in a duty status." Both the Authority, 2 FLRA, at 269, and the Court of Appeals, 672 F.2d, at 737, recognized that there is no corresponding expression, either in the statute or the extensive legislative history, of a congressional intent to pay employee negotiators travel expenses and per diem allowances as well.

⁸ (omitted)

Despite this congressional silence, respondents advance several reasons why the FLRA's determination that such payments are required is consistent with the policies underlying the Act. Each of these arguments proceeds from the assumption that, by providing employee negotiators with official time for bargaining, Congress rejected the model of federal labor relations that had shaped prior administrative practice. In its place, according to respondents, Congress substituted a new vision of collective bargaining under which employee negotiators, like management representatives, are considered "on the job" while bargaining and are therefore entitled to all customary forms of compensation, including travel expenses and per diem allowances.⁹ In order to evaluate this claim, it is necessary briefly to review the rights of employee negotiators to compensation prior to adoption of the Act.

A

Under the 1962 Executive Order establishing the first federal labor relations program, the decision whether to pay union representatives for the time spent in collective bargaining was left within the discretion of their employing agency,¹⁰ apparently on the ground that, without some control by management, the length of such sessions could impose too great a burden on government business. See Report of the President's Task Force on Employee-Management Relations in the Federal Service, reprinted in Legislative History of the Federal Service Labor-Management Relations Statute, Title VII of the Civil Service Reform Act of 1978, at 1177, 1203 (Comm. Print 1979) (hereinafter "Legis. Hist."). Under this early scheme, employee negotiators were not entitled to per diem allowances and travel expenses, on the view that they were engaged, not in official business of the government, but rather in activities "primarily in the interest of the employee organization." 44 Comp. Gen. 617, 618 (1965).¹¹

⁹ In the Interpretation and Guidance, the FLRA also noted that it had previously construed § 7131(c), which authorizes "official time" for employee representatives appearing before the Authority, to require the payment of travel expenses and a per diem allowance. 2 F.L.R.A., at 270. See 44 Fed. Reg. 44771 (July 30, 1979). The fact that the Authority interpreted two similar provisions of the Act consistently does not, however, demonstrate that either interpretation is correct. We, of course, express no view as to whether different considerations uniquely applicable to proceedings before the Authority might justify the FLRA's interpretation of § 7131(c).

¹⁰ Section 9 of Executive Order 10988 encouraged agencies to conduct general consultations with labor representatives on official time, but left them free to conduct collective-bargaining sessions "during the non-duty hours of the employee organization representatives involved in such negotiations." 3 CFR 521, 524-525 (1959-1963 Comp.).

¹¹ The 1962 Executive Order contained no reference to travel expenses or per diem allowances. The decision that such payments were not available was made in 1965 by the Comptroller General, 44 Comp. Gen. 617 (1965), who is authorized to give agencies guidance concerning such disbursements. See 31

Executive Order No. 11491, which became effective in 1970, cut back on the previous Order by providing that employees engaged in negotiations with their agencies could not receive official time, even at the agencies' discretion. See 3 CFR 861-862, 873-874 (1966-1970 Comp.). Again, the prohibition was based on the view that employee representatives work for their union, not for the government, when negotiating an agreement with their employers. See Legis. Hist. at 1167. In 1971, however, at the recommendation of the Federal Labor Relations Council, an amending Executive Order allowed unions to negotiate with agencies to obtain official time for employee representatives, up to a maximum of either 40 hours, or 50% of the total time spent in bargaining. Exec. Order No. 11616, 3 CFR 605 (1971-1975 Comp.). The Council made clear that this limited authorization, which was intended "to maintain a reasonable policy with respect to union self-support and an incentive to economical and businesslike bargaining practices," Legis. Hist. at 1169, did not permit "overtime, premium pay, or travel expenditures." Id., at 1264.

The Senate version of the bill that became the Civil Service Reform Act would have retained the last Executive Order's restrictions on the authorization of official time. S. Rep. No. 95-969, p. 112 (1978). Congress instead adopted the section in its present form, concluding, in the words of one congressman, that union negotiators "should be allowed official time to carry out their statutory representational activities just as management uses official time to carry out its responsibilities." 124 Cong. Rec. 29,188 (1978) (remarks of Rep. Clay). See H.R. Conf. Rep. No. 95-1717, p. 111 (1978).

B

Respondents suggest that, by rejecting earlier limitations on official time, Congress repudiated the view that employee negotiators work only for their union and not for the government. Under the new vision of federal labor relations postulated by respondents, civil servants on both sides of the bargaining table are engaged in official business of the

U.S.C. § 3529. The following year, the Comptroller General modified his position and approved new guidelines issued by the Civil Service Commission. 46 Comp. Gen. 21, 21-22 (1966). The guidelines provided that, while employees should not generally be allowed travel expenses to attend negotiations, such expenses would be approved if an agency head certified that the employee representatives' travel would be in the "primary interest of the government." Ibid. An agency might make such a certification when, for example, it would be more convenient for management to meet at a particular site and more economical to pay the employees' costs of travelling there than to pay the cost for agency representatives to travel to a different site. Ibid. This exception to the earlier prohibition on travel expenses was, by its terms, consistent with the Comptroller General's view that employee negotiators act principally in the interest of their union and not on official business for the United States.

government and must be compensated equally. Because federal employees representing the views of management receive travel expenses and per diem allowances, federal employees representing the views of labor are entitled to such payments as well. In support of this view, respondents rely on the Act's declaration that public sector collective bargaining is "in the public interest" and "contributes to the effective conduct of public business," § 7101(a), as well as on a number of specific provisions in the Act intended to equalize the position of management and labor. For instance, the Act requires agencies to deduct union dues from employees' paychecks and to transfer the funds to the union at no cost, § 7115(a);¹² in addition, agencies must furnish a variety of data useful to unions in the collective-bargaining process, § 7114(b)(4). Respondents also contend that Congress employed the term "official time" in § 7131 specifically to indicate that employee negotiators are engaged in government business and therefore entitled to all of their usual forms of compensation.

Although Congress certainly could have adopted the model of collective bargaining advanced by respondents, we find no indications in the Act or its legislative history that it intended to do so. The Act's declaration that collective bargaining contributes to efficient government and therefore serves the public interest does not reflect a dramatic departure from the principles of the Executive Order regime under which employee negotiators had not been regarded as working for the government. To the contrary, the declaration constitutes a strong congressional endorsement of the policy on which the federal labor relations program had been based since its creation in 1962. See, e.g., Exec. Order 10988, 3 CFR 521 (1959-1963 Comp.) ("participation of employees in the formulation and implementation of personnel policies affecting them contributes to effective conduct of public business"); Exec. Order 11491, 3 CFR 861 (1966-1970 Comp.) ("public interest requires . . . modern and progressive work practices to facilitate improved employee performance and efficiency" and efficient government is "benefited by providing employees an opportunity to participate in the formulation and implementation of personnel policies affecting the conditions of their employment"). See also S. Rep. No. 95-969, p. 12 (1978); 124 Cong. Rec. 29182 (1978) (remarks of Rep. Udall) ("What we really do is to codify the 1962 action of President Kennedy in setting up a basic framework of collective bargaining for Federal employees").¹³

¹² Under the Executive Order regime, unions had to negotiate for dues deductions and were generally charged a fee for the service. See Information Announcement, 1 FLRC 676, 677 (1973).

¹³ We do not read Representative Udall's remark to suggest that the Authority is bound by administrative decisions made under the Executive Order regime. The Act explicitly encourages the Authority to establish policies and provide guidance in the federal labor relations field, § 7105(a)(1), and there are undoubtedly areas in which the FLRA, like the National Labor Relations Authority, enjoys

Nor do the specific provisions of the Act aimed at equalizing the positions of management and labor suggest that Congress intended employee representatives to be treated as though they were "on the job" for all purposes. Indeed, the Act's provision of a number of specific subsidies for union activities supports precisely the opposite conclusion. As noted above, Congress expressly considered and ultimately rejected the approach to paid time that had prevailed under the Executive Order regime. See supra, at 12. In contrast, there is no reference in the statute or the legislative history to travel expenses and per diem allowances, despite the fact that these kinds of payments had also received administrative attention prior to passage of the Act, see supra, at 11 and n. 11. There is, of course, nothing inconsistent in paying the salaries, but not the expenses, of union negotiators. Congress might well have concluded that, although union representatives should not be penalized by a loss in salary while engaged in collective bargaining, they need not be further subsidized with travel and per diem allowances. The provisions of the Act intended to facilitate the collection of union dues, see § 7115, certainly suggest that Congress contemplated that unions would ordinarily pay their own expenses.

Respondents also find their understanding of the role of union representatives supported by Congress's use of the phrase "official time" in § 7131(a). For respondents, the use of this term indicates an intent to treat employee negotiators "as doing the government's work for all the usual purposes," and therefore entitled to "all attributes of employment," including travel expenses and a per diem allowance. Brief for NTEU at 24-28. They suggest that, if Congress intended to maintain only the employees' salaries, it would have granted them "leave without loss of pay," a term it has used in other statutes. See, e.g., 5 U.S.C. § 6321 (absence of veterans to attend funeral services), § 6322(a) (jury or witness duty), and § 6323 (military reserve duty). In contrast, Congress uses their terms "official capacity" and "duty status" to indicate that an employee is "on the job" and entitled to all the usual liabilities and privileges of employment. See, e.g. §§ 5751, 6322(b) (employee summoned to testify in "official capacity" entitled to travel expenses).¹⁴

considerable freedom to apply its expertise to new problems, provided it remains faithful to the fundamental policy choices made by Congress. See supra, at 7-8 and n.8. See also § 7135(b) (decisions under Executive Order regime remain in effect unless revised by President or superseded by Act or regulations or decisions thereunder).

¹⁴ The Authority seemed to rely on this distinction between "duty status" and "leave" in its Interpretation when it stated that an employee negotiator "is on paid time entitled to his or her usual compensation and is not in leave status." 2 FLRA, at 269.

The difficulty with respondents' argument is that Congress did not provide that employees engaged in collective bargaining are acting in their "official capacity," "on the job," or in a "duty status." Instead, the right to a salary conferred by § 7131(a) obtains only when "the employee would otherwise be in a duty status." (Emphasis supplied). This qualifying language strongly suggests that union negotiators engaged in collective bargaining are not considered in a duty status and thereby entitled to all of their normal forms of compensation. Nor does the phrase "official time," borrowed from prior administrative practice, have the same meaning as "official capacity."¹⁵ As noted above, employees on "official time" under the Executive Order regime were not generally entitled to travel expenses and a per diem allowance. See supra, at 10-12. Moreover, as respondents' own examples demonstrate, Congress does not rely on the mere use of the word "official" when it intends to allow travel expenses and per diems. Even as to those employees acting in an "official capacity," Congress generally provides explicit authorization for such payments. See, e.g., §§ 5702, 5751(b), 6322(b). In the Civil Service Reform Act itself, for instance, Congress expressly provided that members of the Federal Service Impasses Panel are entitled to travel expenses and a per diem allowance, in addition to a salary. See § 5703, 7119(c)(4).¹⁶

Perhaps recognizing that authority for travel expenses and per diem allowances cannot be found within the four corners of § 7131(a), respondents alternatively contend that the Authority's decision is supported by the Travel Expense Act, 5 U.S.C. § 5702, which provides that a federal employee "travelling on official business away from his designated post of duty . . . is entitled to . . . a per diem allowance." The Travel Expense Act is administered by the Comptroller General who has concluded that agencies may authorize per diem allowances for travel that is "sufficiently in the interest of the United States so as to be regarded as official business." 44 Comp. Gen. 188, 189 (1964). Under the Executive Order regime, the Comptroller General authorized per diem payments to employee negotiators pursuant to this statute upon a certification that the employees' travel served the convenience of the employing agency. See n. 11, supra.

¹⁵ Similarly, the statement of Representative Clay that employee representatives "should be allowed official time to carry out their statutory representational activities just as management uses official time to carry out its responsibilities," 124 Cong. Rec. 29188 (1978), does not indicate that Congress intended union representatives to be treated as if they are "at work" for all purposes.

¹⁶ As further support for their reading of "official time," respondents contend that union representatives engaged in collective bargaining may be entitled to benefits under the Federal Employees' Compensation Act, 5 U.S.C. § 8101 et seq., and may create government liability under the Federal Tort Claims Act, 28 U.S.C. § 133(b). The fact that other federal statutes, with different purposes, may be construed to apply to employee negotiators, however, does not demonstrate that, in enacting the Civil Service Reform Act, Congress intended to treat union negotiators as engaged in official business of the government.

Based on its view that employee negotiators are "on the job," the Authority determined that union representatives engaged in collective bargaining are on "official business" and therefore entitled to a per diem allowance under the Travel Expense Act. 2 FLRA, at 269. In support of this reasoning, the Authority notes that § 5702 has been construed broadly to authorize reimbursement in connection with a variety of "quasi-official" activities, such as employees' attendance at their own personnel hearings and at privately-sponsored conferences. See, e.g., Comptroller General of the United States, *Travel in the Management and Operation of Federal Programs* 1, App. I at 5 (Rpt. No. FPCD-77-11, Mar. 17, 1977); 31 Comp. Gen. 346 (1952). In each of these instances, however, the travel in question was presumably for the convenience of the agency and therefore clearly constituted "official business" of the government. As we have explained, neither Congress's declaration that collective bargaining is in the public interest nor its use of the term of art "official time" warrants the conclusion that employee negotiators are on "official business" of the government.¹⁷

IV

In passing the Civil Service Reform Act, Congress unquestionably intended to strengthen the position of federal unions and to make the collective-bargaining process a more effective instrument of the public interest than it had been under the Executive Order regime. See supra, at 2-3. There is no evidence, however, that the Act departed from the basic assumption underlying collective bargaining in both the public and the private sector that the parties "proceed from contrary and to an extent antagonistic viewpoints and concepts of self-interest." NLRB v. Insurance Agents, 361 U.S. 477, 488 (1960), quoted in General Building Contractors Association, Inc. v. Pennsylvania, 458 U.S. 375, 394 (1982). Nor did the Act confer on the FLRA an unconstrained authority to equalize the economic positions of union and management. See American Ship Building v. NLRB, supra, 380 U.S., at 316-318. We conclude, therefore, that the FLRA's interpretation of § 7131(a) constitutes an "unauthorized

¹⁷ Our conclusion that federal agencies may not be required under § 7131(a) to pay the travel expenses and per diem allowances of union negotiators does not, of course, preclude an agency from making such payments upon a determination that they serve the convenience of the agency or are otherwise in the primary interest of the government, as was the practice prior to passage of the Act. See n. 11, supra. Furthermore, unions may presumably negotiate for such payments in collective bargaining as they do in the private sector. See Midstate Tel. Corp. v. NLRB, 706 F.2d 401, 405 (CA2 1983); Axelson, Inc. v. NLRB, 599 F.2d 91, 93-95 (CA5 1979). Indeed, we are informed that many agencies presently pay the travel expenses of employee representatives pursuant to collective-bargaining agreements. Letter from Ruth E. Peters, Counsel for Respondent FLRA, Nov. 9, 1983. See also J. P. Stevens & Co., 239 NLRB 738, 739 (1978) (employer required to pay travel expenses as remedy for failing to bargain in good faith).

assumption by [the] agency of [a] major policy decision properly made by Congress." *Id.*, at 318.

The judgment of the Court of Appeals is Reversed.

(1) Payment of per diem. Since BATE, the Authority has ordered agencies to pay travel and per diem for employee representatives appearing before the FLRA. See, Dep't of the Air Force, Sacramento Air Logistics Center, 26 FLRA 674 (1987). The FLRA opined it had authority to order such payments pursuant to 5 U.S.C. § 1731(c) and the implementing regulation, 5 C.F.R. § 2429.13 (1988). In 1989, the Air Force challenged the Authority's ability to order such payments. Dep't of the Air Force v. FLRA, 877 F.2d 1036 (D.C. Cir. 1989).

The FLRA asserted that a review of the previous executive orders and legislative history of the Act indicated that Congress intended such payment. Additionally, the appearance of employee before the FLRA was necessary for the Authority to carry out its Congressional mandate. Consequently, the employee was performing a "public function" and should be granted travel and per diem.

In rejecting the FLRA's arguments, the Court stated: "If anything, the fact that the Authority called the witness might suggest that it ought to bear his expenses, a practice apparently followed by the National Labor Relations Board in unfair labor practice proceedings . . ." *Id.*, at 1041. The Court found that the regulation was without statutory basis, reversing the Authority's decision and practice.

(2) Bargaining of per diem. While the FLRA can not order an agency to pay travel and per diem under Sections 7131(a) or (c), the authority can require agencies to bargain over such payments. The scope of this bargaining, however, is limited.

The FLRA held that travel and per diem expenses for union negotiators is a mandatory topic of bargaining. NTEU and Customs Service, 21 FLRA 6 (1986). This position was sustained by the D.C. Cir. in U.S. Customs Service v. FLRA, 836 F.2d 1381 (D.C. Cir. 1988). The Court deferred to the Authority regarding the scope of bargaining. The Authority opined that because the determination of "official business" is highly discretionary, a union should be permitted to negotiate a provision regarding the exercise of that discretion. See also, AFGE and DOL Mine Safety & Health Admin., 39 FLRA 546 (1991).

Pursuant to the Travel Expense Act (TEA)(1975 Amendments, 89 Stat. 84, PL 94-22 May 19, 1975) and Federal Travel Regulations (FTR), travel and per diem may only be awarded when the travel is due to official business - that is for the

"convenience" or "primary interest" of the government. Consequently, an agency can not negotiate a provision that would authorize payment in cases where the travel is not for official business. A union could negotiate a provision requiring the agency to give the benefit of doubt to the employee, resulting in more determinations of "official business." Such a provision would not violate either the TEA or FTR.

(3) Other Official Time

Unions have unsuccessfully attempted to expand the coverage of 5 U.S.C. § 7131(a) to grievances hearings and statutory appeals. If successful, a union could insist the number of union representatives present at a hearing equal the number of management representatives. Moreover, a union member would be entitled to official time for its representatives.

In Dept. of the Air Force, Randolph Air Force Base and AFGE, 45 FLRA 727 (1992), the union argued it was entitled to two representatives on official time at an arbitration hearing because management had two representatives. In support of this argument, the union cited § 7131(a). The FLRA rejected the unions interpretation of the statute, finding the provision clear on its face. The FLRA declined to expand the requirement for equal representation beyond the words of the statute - "negotiation of a collective bargaining agreement." Because arbitration is not part of the collective bargaining procedure, the FLRA found the union was not entitled to official time or equal representation. The FLRA noted that such representation and official time is negotiable under Section 7131(d). In this case, the union had negotiated official time for one representative. If the union wanted to increase that number, they would have to renegotiate the collective bargaining agreement.

In I.N.S. v. FLRA, 4 F.3d 268 (4th Cir. 1993), INS attempted to limit Section 7131(d) to the two circumstances enumerated in the statute: (1) an employee representing an exclusive representative; and, (2) an employee acting in connection with any matter covered by Chapter 71. The court rejected that narrow reading of the statute, finding proposals to authorize official time for statutory appeals and preparing unfair labor practices negotiable.

In VA Regional Office, Atlanta, GA, 47 F.L.R.A. 1118 (1993), the FLRA found a proposal authorizing official time for lobbying Congress negotiable. The Authority determined because Congress had the power to regulate wages and benefits of federal employees, the unions lobbying actions were in their representational capacity. Therefore, the agency must negotiate the official time proposal for lobbying under Section 7131(d).

3-2. Scope of Bargaining.

There has been substantial resistance to negotiation of collective bargaining agreements by public employees.

President Franklin D. Roosevelt declared:

All government employees should realize that the process of collective bargaining, as usually understood, cannot be transplanted into the public service. It has its distinct and insurmountable limitations when applied to public personnel management. The very nature and purposes of government make it impossible for administrative officials to represent fully or to bind the employer in mutual discussion with government employee organizations. The employer is the whole people who speak by means of laws enacted by their representatives in Congress. Accordingly, administrative officials and employees alike are governed and guided, and in many cases, restricted, by laws which establish policies, procedures, or rules in personnel matters. See Rosenman, The Public Papers and Addresses of Franklin D. Roosevelt, 1937, Vol. 1, p. 325 (1941).

President Roosevelt felt collective bargaining had no place in the public sector. Although collective bargaining does take place, it is restricted because it is recognized that public employees provide essential services and that there should be no bargaining over matters which go to the heart of providing these services.

Management is required to bargain only over conditions of employment. They are defined in section 7103(a)(14):

conditions of employment means personnel policies, practices, and matters, whether established by rule, regulations, or otherwise, affecting working conditions. . . .

There are certain conditions of employment which management may not negotiate. These are known generally as "management rights." Section 7106(a) defines some of the management rights as prohibited subjects of bargaining:

- (1) to determine the mission, budget, organization, number of employees, and internal security practices of the agency; and
- (2) in accordance with applicable laws--
 - (A) to hire, assign, direct, layoff, and retain employees in the agency, or to suspend, remove, reduce in grade or pay, or take other disciplinary action against such employees;

- (B) to assign work, to make determinations with respect to contracting out, and to determine the personnel by which agency operations shall be conducted;
 - (C) with respect to filling positions, to make selections for appointments from--
 - (i) among properly ranked and certified candidates for promotion; or
 - (ii) any other appropriate source; and
 - (D) to take whatever actions may be necessary to carry out the agency mission during emergencies.
-

Management has no authority to negotiate the above areas. If a provision in the agreement deals with them, it will generally be given no effect, regardless of when discovered.

Section 7106(b)(1) enumerates several areas which management may, under the statute, choose to negotiate or may decline to negotiate. It is management's discretion. These permissive/ optional areas are:

On the numbers, types, and grades of employees or positions assigned to any organization subdivision, work project, or tour of duty, or on the technology, methods, and means of performing work;

Finally, sections 7106(b)(2) and (3) provide an exception to the management rights for proposals which address how management officials will exercise any authority reserved to them under the Statute, or appropriate arrangements for employees adversely affected by the exercise of any such authority. This is known as impact and implementation bargaining.

The FSLMRS often leaves the scope of bargaining unclear, so negotiability disputes arise. If management declares the proposal nonnegotiable, the exclusive representative may file an unfair labor practice for failure to bargain in good faith. As an alternative to filing an unfair labor practice, the exclusive representative may appeal management's nonnegotiability declaration to the Authority, asking for a negotiability determination. This latter procedure is preferred. If the complainant should choose the wrong procedure, negotiability determination vs. unfair labor practice, the Authority will refuse jurisdiction and direct the complainant to the proper forum. See OPM, 6 FLRA 44 (1981).

The rules for negotiability determinations (located at 5 C.F.R. Part 2424), which reflect the language of the statute and the underlying intent of Congress, provide that

an exclusive representative must first request, in writing, an agency allegation whether the duty to bargain extends to the matter proposed to be bargained. Within 15 days after service of the agency's written allegation on the exclusive representative, the exclusive representative must file its petition for review with the Authority. The 15-day time limit is strictly adhered to. (See, Arkansas Air National Guard, 6 FLRA 476 (1981); AFGE and Dep't of Veterans Affairs, 44 FLRA 1055 (1992).)

The rules also provide that the exclusive representative may file its petition for review without a written agency allegation in the situation where the agency has not served its written allegation on the exclusive representative within ten days of receipt of the written request for such allegation. Similarly, the union may properly consider an unrequested written contention from the activity that a proposal is nonnegotiable, to be an allegation of nonnegotiability for the purpose of appeal to the Authority under 5 C.F.R. § 2424.3, NTEU and IRS, Kansas City, 10 FLRA 562 (1982). In either situation, the agency head has 30 days from receipt of the petition for review to file with the Authority a full and detailed statement of the agency's position on the matter. Within 15 days of receipt of the agency's statement of position, the exclusive representative must file a response with the Authority. Subject to the aforementioned requirements, the Authority will expedite negotiability proceedings to the extent practicable and issue a written decision with specific reasons at the earliest practicable date.

If there is no dispute as to the negotiability of the proposal, but the parties cannot reach agreement, impasse procedures are utilized. These are discussed in Chapter 4.

The duty to negotiate is continuous and does not end when the collective bargaining agreement (CBA) is signed. If management desires to change a provision of the CBA, the union's consent is required. If a decision is to be made which falls within the scope of the bargaining but is not addressed in the agreement, the union must be given notice and an opportunity to negotiate. If the union indicates its does not desire to negotiate the matter or fails to respond within a reasonable time, management may implement the decision. If the union desires to negotiate the matter, there must be agreement or negotiation to impasse must result.

When a proposal or decision deals with an area which appears to be nonnegotiable but is not obviously so, the labor counselor will be expected to render a legal opinion as to its negotiability. Consult the FSLMRS, decisions of federal courts, and the FLRA to determine if the issue has been addressed and a precedent exists, realizing that these decisions are very much fact specific.

The following cases and materials consider the subject-matter scope of collective bargaining in the Federal sector. What the parties must do to fulfill their obligation to negotiate will be considered in an unfair labor practice context in Chapter Five. In deciding negotiability cases, the Authority looks to the express terms of the FSLMRS, its legislative history, its prior decisions and, most importantly, to the facts of the case.

3-3. Negotiability of Particular Subjects.

a. Conditions of Employment.

As previously discussed, management need only negotiate conditions of employment affecting bargaining unit employees to the extent consistent with Federal law, government-wide regulations, and agency regulations for which a compelling need exists. The labor counselor's first inquiry should be whether or not the proposal has a direct and substantial impact on a condition of employment. If it does not, the matter need not be negotiated. Of course, management may negotiate the matter if it so desires provided it is not a section 7106(a) prohibited subject of bargaining (discussed *infra*). The following case is illustrative of several of these provisions.

ANTILLES CONSOLIDATED EDUCATION ASSOCIATION Union and ANTILLES CONSOLIDATED SCHOOL SYSTEM Agency

22 FLRA 335 1986)

(Extract)

I. Statement of the Case

This case is before the Authority because of a negotiability appeal filed under section 7105(a)(2)(D) and (E) of the Federal Service Labor-Management Relations Statute (the Statute), concerning the negotiability of one five-part Union proposal.

II. Union Proposal

Article 36. BASE/POST PRIVILEGES

1. All unit employees will be granted the use of the following base/post facilities:

A. Base/Post Exchanges at the site to which the employee is assigned.

B. All retail food outlets operated by the Navy Exchange, AAFES, or Coast Guard Exchange at the site to which the employee is assigned, or

C. Access to the nearest exchange system and its retail food outlets in any case in which an employee is assigned to a site at which the facilities described in subsection A and B are not operated.

D. Base/post/station/fort special services recreation and morale support facilities at the site to which the employee is assigned.

E. Hospital facilities on a paid basis.

A. Position of the Parties

The Agency asserts that the proposal is nonnegotiable for four reasons: (1) it does not concern matters affecting working conditions of bargaining unit employees, within the meaning of section 7103(a)(14) of the Statute; (2) the Agency is without authority to bargain over the proposed benefits; (3) bargaining on the proposal is barred by regulations for which a compelling need exists; (4) negotiation on parts D and E of the proposal is foreclosed by applicable law.

The Union did not provide any arguments in its petition for review supporting the negotiability of the proposal, nor did it file a reply brief.

We will examine the Agency's contentions, in turn.

B. Analysis

1. Conditions of Employment of Bargaining Unit Employees

Under the statutory scheme established by sections 7103(a)(12), 7106, 7114 and 7117 a matter proposed to be bargained which is consistent with Federal law, including the Statute, Government-wide regulations or agency regulations is, nonetheless, outside the duty to bargain unless such matter directly affects the conditions of employment of bargaining unit employees. The term "conditions of employment" is defined in section 7103(a)(14) as "personnel policies, practices, and matters whether established by rule, regulation, or otherwise, affecting working conditions . . ."

In deciding whether a proposal involves a condition of employment of bargaining unit employees the Authority considers two basic factors:

(1) Whether the matter proposed to be bargained pertains to bargaining unit employees; and

(2) The nature and extent of the effect of the matter proposed to be bargained on working conditions of those employees.

For example, as to the first factor, the question of whether the proposal pertains to bargaining unit employees, a proposal which is principally focused on nonbargaining unit positions or employees does not directly affect the work situations or employment relationship of bargaining unit employees. See, National Federation of Federal Employees, Local 1451 and Naval Training Center, Orlando, Florida, 3 FLRA 88 (1980) *aff'd sub nom. National Federation of Federal Employees v. FLRA*, 652 F.2d 191 (D.C. Cir. 1981) (Proposal requiring management to designate a particular number of representatives to negotiations was held to be outside the duty to bargain). But, a proposal which is principally focused on bargaining unit positions or employees and which is otherwise consistent with applicable laws and regulations is not rendered nonnegotiable merely because it also would have some impact on employees outside the bargaining unit. See, Association of Civilian Technicians, Pennsylvania State Council and Pennsylvania Army and Air National Guard, 14 FLRA 38 (1982) (Union Proposal 1 defining the competitive area for reduction-in-force as coextensive with the bargaining unit was held to be within the duty to bargain even though it had an impact on nonbargaining unit employees).

Part 1 of the Appendix to this decision references other Authority decisions concerning the nature and extent of the affect of a proposal on bargaining unit employees.

As to the second factor, relating to the effect of a proposal on working conditions, the question is whether the record establishes that there is a direct connection between the proposal and the work situation or employment relationship of bargaining unit employees. For example, a proposal concerning off-duty hour activities of employees was found to be outside the duty to bargain where no such connection was established. See, International Association of Fire Fighters, AFL-CIO, CLC, Local F-116 and Department of the Air Force, Vandenberg Air Force Base, California, 7 FLRA 123 (1981) (Proposal to permit employees to utilize on-base recreational facilities during off-duty hours found not to concern personnel policies, practices, or matters affecting working conditions of bargaining unit employees).

On the other hand, a proposal concerning off-duty hour activities of employees was held to affect working conditions of bargaining unit employees where the requisite connection was established. National Federation of Federal Employees, Local 1363 and Headquarters, U.S. Army Garrison, Yongsan, Korea, 4 FLRA 139 (1980) (Proposal to revise

the agency's "ration control" policy was found to concern standards of health and decency which were conditions of employment under agency regulations).

Part 2 of the Appendix to this decision references other Authority decisions concerning the nature and effect of a proposal on bargaining unit employees' working conditions.

Applying the first factor to the disputed proposal we find that the proposal expressly pertains only to bargaining unit employees. No claim is made that the proposal has any impact on nonbargaining unit employees. However, we must also assess the nature and effect of the proposal on bargaining unit employees' working conditions under the second factor. Here the Agency argues without contravention that access to the retail, recreational and medical facilities denoted in the proposal would occur primarily during the employees' non-duty hours. Further, the Union has provided no evidence, whatever, and the record does not otherwise establish that access to the facilities in question is in any manner related to the work situation or employment relationship or is otherwise linked to the employees' assignments within the school system in Puerto Rico. As a result we find the disputed proposal is to the same effect as the proposal permitting employees to use on-base recreational facilities during off-duty hours found outside the agency's obligation to bargain in Vandenberg Air Force Base, 7 FLRA 123 (1981). Thus, the disputed proposal also does not directly affect working conditions of bargaining unit employees and is outside the Agency's obligation to bargain.

2. Matters within the Agency's Authority to Bargain

It is well established that the duty of an agency under the Statute is to negotiate with an exclusive representative of an appropriate unit of its employees concerning conditions of employment affecting them to the extent of its discretion, that is, except as provided otherwise by Federal law including the Statute, or by Government-wide rule or regulation or by an agency regulation for which a compelling need exists. For example, see, National Treasury Employees Union and Department of the Treasury, Bureau of the Public Debt, 3 FLRA 769 (1980), *aff'd sub nom., National Treasury Employees Union v. FLRA*, 691 F.2d 553 (D.C. Cir. 1982).

It is also well established that an agency may not foreclose bargaining on an otherwise negotiable matter by delegating authority as to that matter only to an organizational level within the agency different from the organizational level of recognition. Rather, under section 7114(b)(2)

of the Statute, an agency is obligated to provide representatives who are empowered to negotiate and enter into agreement on all matters within the statutorily prescribed scope of negotiations. American Federation of Government Employees, AFL-CIO, Local 3525 and United States Department of Justice, Board of Immigration Appeals, 10 FLRA 61 (1982) (Union Proposal 1). Thus, the Agency's claim that the Superintendent of the Department of Navy Antilles School System is without authority to bargain on access to Navy retail, recreational or medical facilities because such facilities are in separate chains of command within the Department of Navy from the school system cannot be sustained. See, American Federation of Government Employees, AFL-CIO, Local 1409 and U.S. Adjutant General Publications Center, Baltimore, Maryland, 18 FLRA No. 68 (1985). Similarly, the Agency's argument that the Superintendent is without authority to bargain on access to Army facilities which are under the jurisdiction of a separate subdivision of DOD also cannot be sustained. See, Defense Contract Administration Services Region, Boston, Massachusetts, 15 FLRA 750 (1984).

As to Coast Guard facilities, there is nothing in the record in this case which indicates that the Agency lacks the discretion to at least request the Department of Transportation to extend access to such Coast Guard facilities to Antilles School System employees. Thus, the Agency is obligated to bargain on access to Coast Guard facilities to this extent. See, American Federation of State, County and Municipal Employees, AFL-CIO and Library of Congress, Washington, D.C., 7 FLRA 578 (1982) (Union proposals XI-XVI), *enf'd sub nom., Library of Congress v. FLRA*, 699 F.2d 1280 (D.C. Cir. 1983).

3. Compelling Need (omitted)
4. Consistency with law of Parts D and E of the Proposal
 - a. Part D of the Proposal

According to the record this part of the proposal would permit the Antilles School System employees to patronize on-post retail liquor stores.

While the Agency's claims that Puerto Rico law precludes the sale of Commonwealth tax-free alcoholic beverages to these civilian employees we find such claim unsupported in the record. That is, the DOD regulations, which were included in the record by the Agency, specifically permit patronage of on-post retail liquor stores by other categories of persons, such as dependents of military personnel, who, like the civilian employees in this case, are not expressly listed as exempt under the Puerto Rico Statute. See, Puerto Rico Laws Annotated tit. 13 § 6019

(1976). Thus, we do not find that the Agency has established that Part D of the proposal is inconsistent with law.

b. Part E of the Proposal

Part E of the proposal would permit employees to use the local Navy hospital on a paid basis. However, under 24 U.S.C. § 34 Federal employees located outside the continental limits of the United States and in Alaska may receive medical care at a naval hospital only "where facilities are not otherwise available in reasonably accessible and appropriate non-Federal hospitals." Also, under 24 U.S.C. § 35, such employees may be hospitalized in a naval hospital "only for acute medical and surgical conditions . . ." Since Part E of the proposal contains no limitations on access to the local naval hospital, it is inconsistent with the express statutory provisions governing such access.

C. Conclusion

The Authority finds, for the reasons set forth in the preceding analysis, that the entire proposal in this case concerns matters which are not conditions of employment of bargaining unit employees. Consequently, it is not within the duty to bargain although the Agency could negotiate on the proposal if it chose to do so, except for Part E.

Further, the Authority concludes that as Part E of the proposal is inconsistent with Federal law, it is outside the scope of the duty to bargain pursuant to section 7117(a)(1) of the Statute.

III. Order

Accordingly, pursuant to section 2424.10 of the Authority's Rules and Regulations, IT IS ORDERED that the petition for review be, and it hereby is, dismissed.

APPENDIX

Part 1

The following cases involve examples of proposals found outside the duty to bargain because of the impact on individuals or positions outside the bargaining unit.

National Council of Field Labor Locals, American Federation of Government Employees, AFL-CIO and U.S. Department of Labor,

Washington, D.C., 3 FLRA 290 (1980) (Proposal I establishing the method management will use in filling supervisory and management positions found not to affect working conditions of bargaining unit employees).

American Federation of Government Employees, National Council of EEOC Locals No. 216, AFL-CIO and Equal Employment Opportunity Commission, Washington, D.C., 3 FLRA 504 (1980) (Proposal relating to the assessment and training of supervisors found not to affect working conditions of bargaining unit employees).

National Treasury Employees Union and Internal Revenue Service, 6 FLRA 522 (1981) (Proposal VI requiring management to notify individuals who telephone the agency for tax information that such calls are subject to monitoring found not to affect working conditions of bargaining unit employees).

National Association of Government Employees, Local R7-23 and Headquarters, 375th Air Base Group, Scott Air Force Base, Illinois, 7 FLRA 710 (1982) (Proposal concerning discipline of management officials and supervisors found not to affect working conditions of bargaining unit employees).

American Federation of Government Employees, AFL-CIO, Local 2272 and Department of Justice, U.S. Marshals Service, District of Columbia, 9 FLRA 1004 (1982) (The portion of Proposal 5 which required management to prosecute private citizens who file false reports found not to affect working conditions of bargaining unit employees).

Association of Civilian Technicians, State of New York, Division of Military and Naval Affairs, Albany, New York, 11 FLRA 475 (1983) (Proposal 2 concerning procedures for filling military positions found not to affect the working conditions of bargaining unit employees).

American Federation of Government Employees, AFL-CIO, Local 2302 and U.S. Army Armor Center and Fort Knox, Fort Knox, Kentucky, 19 FLRA 778 (1985) (Proposal 4 prescribing the content of certain management records relating to employees, the manner in which such records are maintained and restrictions on management access to such records found not to affect working conditions of bargaining unit employees).

Part 2

A. The following cases involve examples of proposals found outside the duty to bargain because of the absence of a direct affect on bargaining unit employees' working conditions.

National Association of Air Traffic Specialists and Department of Transportation, Federal Aviation Administration, 6 FLRA 588 (1981) (Proposal IV permitting employee allotments from pay for "Political Action Fund" to be used in "political efforts to improve working conditions" found to affect working conditions in only a remote and speculative manner).

National Federation of Federal Employees, Council of Consolidated Social Security Administration Locals and Social Security Administration, 13 FLRA 422 (1983) (Proposals 3 and 4 requiring management to utilize recycled paper products and to provide the union with such recycled paper products upon request found not to directly affect bargaining unit employees' working conditions as there was no demonstration in the record of any such effect).

Maritime Metal Trades Council and Panama Canal Commission, 17 FLRA 890 (1985) (Proposals 1 and 2 permitting employees to cash personal checks at the agency's treasury found not to directly affect working conditions of bargaining unit employees).

B. The following cases involve examples of proposals found to directly affect working conditions of bargaining unit employees.

American Federation of Government Employees, AFL-CIO and Air Force Logistics Command, Wright-Patterson Air Force Base, Ohio, 2 FLRA 604 (1980) (Union Proposal 1), *enf'd as to other matters sub nom.*, Department of Defense v. FLRA, 659 F.2d 1140 (D.C. Cir. 1981), *cert. denied sub nom.*, AFGE v. FLRA, 455 U.S. 945 (1982) (A proposal to establish a union operated day care facility on agency property was found to directly affect bargaining unit employees by enhancing an individual's ability to accept employment or to continue employment with the agency and to promote workforce stability and prevent tardiness and absenteeism).

National Treasury Employees Union and Internal Revenue Service, 3 FLRA 693 (1980) (Union Proposal I establishing criteria for approval of outside employment was found to directly affect working conditions of unit employees because agency regulations which set forth policies governing outside employment were determinative of employee eligibility for certain

positions and even prescribed whether employees could continue to be employed).

Planners, Estimators and Progressmen Association, Local No. 8 and Department of the Navy, Charleston Naval Shipyard, Charleston, South Carolina, 13 FLRA 455 (1983) (A proposal to permit bargaining unit employees to record their time and attendance manually instead of mechanically through use of a time clock found to directly concern working conditions of such employees).

United States Department of Justice, United States Immigration and Naturalization Service and American Federation of Government Employees, AFL-CIO, Local 2509, 14 FLRA 578 (1984) (Assignment of Government-owned housing to employees was found to directly affect working conditions of bargaining unit employees in circumstances where there was a lack of adequate housing in the geographic area and the Government-owned housing in question was constructed for the benefit and use of employees stationed at the hardship location).

American Federation of Government Employees, AFL-CIO, Local 1770 and Department of the Army, Headquarters, XVIII Airborne Corps and Fort Bragg, Fort Bragg, North Carolina, 17 FLRA 752 (1985) (Proposal 4 requiring the agency to provide lockers or other secure areas for employees' personal items during working hours found to directly affect working conditions of unit employees).

The FLRA has followed the definition of "conditions of employment" set out in the above case. See, AFGE and VA, 41 FLRA 73 (1991), and VA Medical Center, Leavenworth, Kansas, 40 FLRA 592 (1991).

b. Negotiating Matters Which Are Contrary to Federal Law, Government-wide Regulations or Agency Regulations-Prohibited Subjects (proposals which are not negotiable). Section 7117(a).

(1) Negotiating Proposals Which Contradict Federal Law.

A union proposal which is contrary to a statute is nonnegotiable. Management has no discretion to change the statute.

Examples include:

See the discussion of Part 4. of the Antilles case above.

In Fort Shafter, Hawaii, 1 FLRA 563 (1979), the Authority held that an agency shop proposal conflicts with 5 U.S.C. § 7102, which assures employees the right to form, join, or assist any labor organization, or to refrain from any such activity. The same result was reached in AFGE and McClellan Air Force Base, 44 FLRA 98 (1992).

Official time to prepare for "interface" activities does not constitute "internal union business," and conflict with 5 U.S.C. § 7131(b), the Authority held in Mather AFB, 3 FLRA 304 (1980) and ARRACOM, 3 FLRA 316 (1980). Consequently, proposals dealing with official time for preparing for negotiations, impasse proceedings, and counterproposals, are negotiable matters under section 7131(d). See, Social Security Administration and AFGE, 13 FLRA 112 (1983).

In VA, Minneapolis and Farmers Home Administration, 3 FLRA 310 and 320 (1980), respectively, the Authority held that there was no requirement to expressly exclude from negotiated grievance procedures matters which, under provisions of law, may not be grieved under such procedures.

[S]ection 7121 . . . already provides that negotiated grievance procedures cover, at a maximum, matters which under the provisions of law could be submitted to the procedures.

Veterans Administration was not required to bargain over union proposals creating grievance and arbitration procedures for medical professionals regarding allegations of inaptitude, inefficiency, or misconduct. 38 U.S.C. § 4110 provides exclusive disciplinary procedures to be followed. Veterans Admin. Med. Cntr., Minneapolis v. F.L.R.A., 705 F.2d 953 (8th Cir., 1983)(rehearing en banc denied). In Colorado Nurses Assoc. and VA Med. Cntr., Ft. Lyons, 25 F.L.R.A. 803 (1987) the Authority held that a union proposal to create a grievance and arbitration system, for matters not excluded by 38 U.S.C. § 4110, were bargainable.

The National Guard was not required to negotiate regarding union proposals which would allow binding arbitration of matters reserved for the exclusive review of the state adjutants general by the National Guard Technicians Act. State of Neb., Military Dept. v. F.L.R.A., 705 F.2d 945 (8th Cir., 1983).

A union proposal to require an agency to waive collection of interest and penalties on debts owed the government was held nonnegotiable in NFFE and Engineer District, Kansas City, 21 FLRA 101 (1986). The FLRA determined that the Federal Debt Collection Act of 1982 required such collections and did not grant agencies such discretionary authority.

In NFFE and DA, Moncrief Army Community Hosp., 40 FLRA 1181 (1991), the Authority held that the agency was not required to bargain over a union proposal which was inconsistent with federal law.

(2) Negotiating Proposals Which Contradict Executive Orders or Government-Wide Regulations.

If a proposal conflicts with an executive order or government-wide regulation, it is nonnegotiable. The rationale is that the agency cannot change these provisions. A government-wide regulation is one which is applicable to the Federal work force as a whole. Most of them (for Department of Defense) are regulations promulgated by the Office of Personnel Management or the General Services Administration.

N.T.E.U. and I.R.S.

3 FLRA 675 (1980)

(Extract)

Union Proposal

Pre-paid parking spaces for bargaining unit employees' private vehicles, at the New Orleans, Baton Rouge, Shreveport, Lake Charles, and Houma posts of duty, will not be released to the General Services Administration.

Question Here Before the Authority

The questions are, first of all, whether the union's proposal is inconsistent with applicable Government-wide regulations under section 7117(a) of the Statute; or secondly, whether the union's proposal concerns a matter which is negotiable at the election of the agency under section 7106(b)(1) of the Statute; or finally, whether the union's proposal violates sections 7106(a)(1) of the Statute.

Opinion

Conclusion: The union's proposal, insofar as it requires the agency to retain the disputed parking spaces, is consistent with applicable Government-wide regulations under section 7117(a) of the Statute, does not concern a matter which may be negotiated at the election of the agency within the meaning of section 7106(b)(1) of the Statute, and does not violate the agency's rights under section 7106(a)(1) of the Statute. However, to the extent that the proposal implicitly requires the agency to provide the parking spaces so retained free of charge to employees, it is inconsistent with applicable Government-wide regulations under section

7117(a) of the Statute. Accordingly, . . . the agency's allegation that the disputed proposal is not within the duty to bargain is sustained in part and set aside in part.

Reasons: Under the Statute, the duty of an agency to negotiate with an exclusive representative extends to the conditions of employment affecting employees in an appropriate unit except as provided otherwise by Federal law and regulation, including Government-wide regulation. That is, under the Statute, if a proposed matter relates to the conditions of employment of an appropriate unit of employees in an agency and is not inconsistent with law or regulation--*i.e.*, is within the discretion of an agency--it is within the scope of bargaining which is required of that agency. In this case, the agency alleges, first of all, that the union's proposal is not within the duty to bargain because it is contrary to applicable Government-wide regulations. Specifically, the agency alleges that retention of the employee parking spaces which are the subject of the instant dispute conflicts with provisions of the Federal Property Management Regulations (FPMR).

The initial question is whether the provision of the FPMR (41 C.F.R. Subchapter D) at issue herein constitute a "Government-wide rule or regulation" within the meaning of the Statute. The phrase "Government-wide rule or regulation" is used in two different subsections of section 7117 of the Statute. First of all, as here in issue, it is used in section 7117(a) to state a limitation on the scope of bargaining; *i.e.*, matters which are inconsistent with Government-wide rule or regulation are not within the duty to bargain. Secondly, it is used in section 7117(d) to state the right of an exclusive representative, in certain circumstances, to consult with respect to the issuance of such rules and regulations effecting any substantive change in any condition of employment. In neither of these contexts does the Statute precisely define what constitutes a "Government-wide rule or regulation" within the meaning of section 7117.

[The Authority discusses the legislative history of this section of the CSRA.]

Thus, Congress intended the term "Government-wide regulation" to include those regulations and official declarations of policy which apply to the Federal civilian work force as a whole and are binding on the Federal agencies and officials to which they apply.

However, while the legislative history of the term "Government-wide" indicates Congress intended that regulations which only apply to a limited segment of the Federal civilian work force not serve to limit the duty to bargain, it does not precisely define the outer limits of the reach

required of a regulation in order for that regulation to be a "Government-wide" regulation within the meaning of section 7117. That is, it is unclear, for example, whether Congress intended that a regulation must apply to all employees in the Federal civilian work force in order to constitute a "Government-wide" regulation. In this regard, it is a basic rule of statutory construction that legislative enactments are to be construed so as to give them meaning. A requirement that a regulation apply to all Federal civilian employees in order to constitute a "Government-wide" regulation under section 7117 would render that provision meaningless, since it does not appear that there is any regulation which literally affects every civilian employee of the Federal Government. Furthermore, such a literal definition of the term would also render meaningless the concomitant right of a labor organization under section 7117(d) of the Statute in appropriate circumstances to consult with the issuing agency on Government-wide rules or regulations effecting substantive changes in any conditions of employment. In this regard, the legislative history of the Statute indicates that Congress intended the consultation rights provided in section 7117(d) to be substantial union rights.

* * *

The issue then becomes whether the union proposal in dispute herein is inconsistent with the provisions of the FPMR cited by the agency. In this regard, since GSA has primary responsibility for the issuance and interpretation of these regulations, the Authority requested an advisory opinion from GSA regarding whether any part of current FPMR would prevent an agency from providing free parking spaces for employee personally owned vehicles which are not used for official business.

* * *

In summary, GSA interprets applicable provisions of the FPMR, specifically, 41 C.F.R. § 101-17.2, as imposing upon an agency the obligation to relinquish space to GSA, including space for parking, after the agency determines that such space is no longer needed or is under-utilized. GSA also stated that this duty of an agency to relinquish space is contingent upon a determination by the agency that the space is no longer needed or is under-utilized. That is, according to GSA, under the FPMR, an agency has discretion to determine whether it needs, or is able to utilize, a given space. GSA then concluded, without citing any provision of the FPMR in support, that the agency could not make the requisite determination, *i.e.*, exercise its discretion under the FPMR, through negotiations as provided by the union's proposal.

The Authority, for purposes of this decision, adopts GSA's conclusion that an agency is obligated to relinquish space to GSA,

including space for parking, once the agency determines in its discretion, that such space is no longer needed or utilized. However, GSA's further conclusion that the agency could not exercise its discretion in this regard through negotiations with a union is without support. As stated at the outset of this decision, Congress, in enacting the Federal Service Labor-Management Relations Statute, established a requirement that an agency negotiate with the exclusive representative of an appropriate unit of its employees over the conditions of employment affecting those employees, except to the extent provided otherwise by law or regulation. That is, to the extent that an agency has discretion with respect to a matter affecting the conditions of employment of its employees, that matter is within the duty to bargain of the agency.

* * *

GSA also states, however, that even if the agency's decision to relinquish space is subject to the duty to bargain under the Statute, the agency would be precluded from agreeing to provide those spaces free of charge by provision of FPMR Temporary Regulation D-65 (Temp. Reg. D-65), 44 Fed. Reg. 53161 (1979). Specifically, under section 11 of this regulation, Federal employees utilizing government-controlled parking spaces shall be assessed a charge at a rate which is the same as the commercial equivalent value of those parking spaces. (Between November 1, 1979, and September 30, 1981, however, the charge will be one-half of the full rate to be charged.) This regulation is presently in effect and applies to the parking spaces here in dispute. Further, based upon the analysis stated above, this regulation, which is generally applicable throughout the executive branch, is a Government-wide regulation within the meaning of section 7117 of the Statute and precludes negotiation on a conflicting union proposal. Thus, since the union proposal would require the agency to provide the disputed parking spaces free of charge to employees, it is inconsistent with FPMR Temporary Regulation D-65 and, to that extent, is outside the agency's duty to bargain under the Statute.

* * *

In summary, consideration of each of the grounds for nonnegotiability alleged by the agency leads to the conclusion that, for the foregoing reasons, the union's proposal, insofar as it would require the agency to retain the disputed parking spaces for employee parking is within the agency's duty to bargain under the Statute; but to the extent that it would require the agency to provide those spaces free of charge to employees, it conflicts with the currently applicable Government-wide regulation, namely, FPMR Temporary Regulation D-65 44 Fed. Reg.

53161 (1979), under section 7117(a) of the Statute, and thus, in that respect, is outside the agency's duty to bargain.

In NFFE and Dep't of the Army, U.S. Army Armament, Munitions and Chemical Command, Rock Island, Illinois, 33 FLRA 436 (1988), the Authority determined that the Mandatory Guidelines for Federal Workplace Drug Testing, issued by HHS, are a government-wide regulation. The Guidelines were issued in accordance with Executive Order No. 12564 and the 1987 Supplemental Appropriations Act. The Guidelines are binding on executive agencies, uniformed services and any other federal employing unit except the Postal Service and the legislative and judicial branches. *Remanded on other grounds Dep't of the Army v. FLRA*, 890 F.2d 467 (D.C. Cir. 1989), decision on remand, 35 FLRA 936 (1990).

Numerous union proposals have been found to be nonnegotiable because they are contrary to the provisions of the Mandatory Guidelines. In AFGE and Sierra Army Depot, 37 FLRA 1439 (1990) the union proposed (proposal 4) that employees who are unable to provide a sufficient amount of urine on the appointed day be allowed to return the next day for testing. The Authority found the proposal inconsistent with the Mandatory Guidelines and, therefore, nonnegotiable under section 7117(a)(1). The same result was reached in International Federation of Professional and Technical Engineers, Local 89 and Bureau of Reclamation, Grand Coulee Project Office, 48 FLRA 516, 530 (1993)(proposal IV.E.4). A union proposal to freeze any samples not tested on the day collected was also found to be inconsistent with the government-wide regulation. *Id.*, at 529 (Proposal IV.E.2).

Effective date for Government-wide regulations.

Under section 7117 of the Statute, Government-wide rules and regulations bar negotiation over and agreement to union proposals that conflict with them. Except for Government-wide rules or regulations implementing 5 U.S.C. § 2302, however, Government-wide rules or regulations do not control over conflicting provisions in a collective bargaining agreement if the agreement was in effect before the date the rule or regulation was prescribed. See, 5 U.S.C. § 7116(a)(7). (citations omitted).

DA, Headquarters III Corps and Fort Hood and AFGE, 40 FLRA 636, 641 (1991). The Authority went on to say that the Government-wide regulations become enforceable, by operation of law, when the agreement expires. Negotiations or renewal of the CBA will not prevent the regulation or rule from coming into force.

(3) Negotiating Proposals Which Contradict Agency Regulations- Compelling Need.

If the Union should advance a proposal which contradicts an agency's or its primary national subdivision's regulation or rule, management may assert that the proposal is nonnegotiable because there is a compelling need for the rule or regulation.

The union may then petition the Authority, requesting that a compelling need determination be made. The Authority will review the facts and the parties' arguments, and apply its compelling need criteria to make a ruling.

5 U.S.C. § 7117 provides:

(a)(1) Subject to paragraph (2) of this subsection, the duty to bargain in good faith shall, to the extent not inconsistent with any Federal law or any Government-wide rule or regulation, extend to matters which are the subject of any rule or regulation only if the rule or regulation is not a Government-wide rule or regulation.

(2) The duty to bargain in good faith shall, to the extent not inconsistent with Federal law or any Government-wide rule or regulation, extend to matters which are the subject of any agency rule or regulation . . . only if the Authority has determined under subsection (b) of this section that no compelling need exists for the rule or regulation.

(3) Paragraph (2) of the subsection applies to any rule or regulation issued by any agency or issued by any primary national subdivision of such agency, . . .

(b)(1) In any case of collective bargaining in which an exclusive representative alleges that no compelling need exists for any rule or regulation referred to in subsection (a)(3) of this section which is then in effect and which governs any matter at issue in such collective bargaining, the Authority shall determine under paragraph (2) of this subsection, in accordance with regulations prescribed by the Authority, whether such a compelling need exists.

(2) For the purpose of this section, a compelling need shall be determined not to exist for any rule or regulation only if--

(A) the agency, or primary national subdivision, as the case may be, which issued the rule or regulation informs the Authority in writing that a compelling need for the rule or regulation does not exist; or

(B) the Authority determines that a compelling need for a rule or regulation does not exist."

The proper forum to address the question of compelling need is in a negotiability proceeding and not an ULP proceeding. FLRA v. Aberdeen Proving Ground, 485 U.S. 409 (1988).

The compelling need criteria are located at 5 C.F.R. § 2424.11:

A compelling need exists for an agency rule or regulation concerning any condition of employment when the agency demonstrates that the rule or regulation meets one or more of the following illustrative criteria;

- (a) The rule or regulation is essential, as distinguished from helpful or desirable, to the accomplishment of the mission or the execution of functions of the agency or primary national subdivision in a manner which is consistent with the requirements of an effective and efficient government.
- (b) The rule or regulation is necessary to insure the maintenance of basic merit principles.
- (c) The rule or regulation implements a mandate to the agency or primary national subdivision under law or other outside authority, which implementation is essentially nondiscretionary in nature.

In NFFE and Alabama Air National Guard, 16 FLRA 1094 (1984), the agency argued that its regulation, requiring an appeal of a RIF action be filed 30 days before the effective date of the action, was essential to its operation. Because the union proposal would prolong the time for appeal until after the effective date of the RIF, it could require corrective action after the RIF, and potentially require the agency to undo the RIF. The FLRA opined that while adhering to the agency time limits would be helpful to the agency's mission and the execution of its functions, the regulation was not essential to these agency objectives. In so deciding the FLRA noted that the agency regulation provided that the appeal time limit could be extended, and also recognized that corrective action might be necessary even after a RIF was effectuated, which was exactly the sort of disruption the agency was then arguing that the regulation was essential to prevent.

In Lexington-Bluegrass Army Depot, 24 FLRA 50 (1986), the Authority examined an appeal of an arbitration award which conflicted with agency regulations for which a compelling need had been found. The matter grieved involved an installation holiday closure to conserve energy, which forced employees to take annual leave or be placed on leave without pay. The FLRA found that there was no compelling need for the base closure regulations; that is, a showing of monetary saving alone is insufficient to establish that a regulation is essential, as opposed to merely desirable. In summary

Lexington-Bluegrass held that although the decision to close all or part of an installation is nonnegotiable, the determination as to employee leave status during the closure period is mandatorily negotiable.

In Fort Leonard Wood, 26 FLRA 593 (1987), the Authority ordered the command to negotiate on four union proposals made in response to implementation of a smoking policy. Despite the Army's assertion to the contrary, the Authority found the union proposals involved conditions of employment and had only a limited effect on non-bargaining unit members. Most importantly, the Authority decided that the Army had not established a "compelling need" for its regulations governing smoking in workplaces. While smoking restrictions might generally relate to mission accomplishment, the Army had failed to demonstrate that the restrictions were essential to this purpose. Therefore, union proposals to allow smoking in corridors, lobbies, restrooms, and military vehicles, as well as eating facilities and child care centers with certain restrictions, were negotiable.

In AFGE and General Services Administration, 47 FLRA 576, 580 (1993), the Authority restated its position that "collective bargaining agreements, rather than agency regulations, govern the disposition of matters to which they both apply."(citation omitted).

c. Negotiating Matters Which Are Contrary to Statute - Management Rights - Prohibited Subjects (proposals which are not negotiable). Section 7106(a).

Most of the proposals which are contrary to a statute are contrary to the management rights provisions of 5 U.S.C. § 7106. They are those subjects which Congress has decreed will not be negotiated because they go to the heart of managing effectively and efficiently.

1. Mission, Budget, Organization, Number of Employees, and Agency Internal Security Practices. Section 7106(a)(1).

(a) Mission. "[T]he mission of the agency," the Authority said in Air Force Logistics Command (AFLC), 2 FLRA 604 (1980), is "those particular objectives which the agency was established to accomplish." The mission of the Air Force Logistics Command, for example, is the providing "of logistical support to the Air Force." Not all of any agency's programs are part of its mission. An EEO program was held not to be directly or integrally related to the mission of the Air Force Logistics Command. See also, West Point Teacher's Assoc. v. FLRA, 855 2d. 236 (2d. Cir. 1988); where court held negotiations over school calendar interferes with management's right to determine its mission.

In NLRB Union Local 21 and NLRB, 36 FLRA 853 (1990) the Authority held a union proposal that the Agency change the hours it was open to the public to be

nonnegotiable. The Authority found this proposal to be a direct interference with management's right to determine its mission, i.e. when it would be open to the public.

(b) Budget. The meaning of budget is not defined in the FSLMRS. In the AFLC case, the agency contended that a proposal requiring the activity to provide space and facilities for union-operated day care centers interfered with the agency's right to determine its budget. In rejecting this contention, the Authority said that a proposal does not infringe on an agency's right to determine its budget unless (a) the proposal expressly prescribed either the programs or operations the agency would include in its budget or the amounts to be allocated in the budget for the programs or operations, or (b) the agency "makes a substantial demonstration that an increase in costs is significant and avoidable and not offset by compensating benefits." Department of the Air Force, Elgin AFB, 24 FLRA 377 (1986), where the FLRA discussed in detail the two-prong test set out in AFLC.

AF LOGISTICS COMMAND, WRIGHT-PATTERSON AFB, OHIO

2 FLRA 604 (1980)

(Extract)

[The Union submitted the following proposal:]

ARTICLE 36 DAY CARE FACILITIES

The employer will provide adequate space and facilities for a day care center at each ALC. The union agrees to operate the day care center in a fair and equitable manner. The use of the facilities to be available to all base employees under the terms and conditions of the constitution and by-laws of such facility. The day care center will be self-supporting, exclusive of the services and facilities provided by the employer.

* * *

The agency next alleges that Union Proposal I violates its right to determine its budget under section 7106(a)(1) of the Statute because it would require the agency to bear the cost of the space and facilities provided for the day care center. The underlying assumption of this position appears to be that a proposal is inconsistent with the authority of the agency to determine its budget within the meaning of section 7106(a)(1) if it imposes a cost upon the agency which requires the expenditure of appropriated agency funds. Such a construction of the Statute, however, could preclude negotiation on virtually all otherwise

negotiable proposals, since, to one extent or another, most proposals would have the effect of imposing costs upon the agency which would require the expenditure of appropriated agency funds. Nothing in the relevant legislative history indicates that Congress intended the right of management to determine its budget to be so inclusive as to negate in this manner the obligation to bargain.

There is no question but that Congress intended that any proposal which would directly infringe on the exercise of management rights under section 7106 of the Statute would be barred from negotiation.⁸ Whether a proposal directly affects the agency's determination of its budget depends upon the definition of "budget" as used in the Statute. The Statute and legislative history do not contain such a definition. In the absence of a clearly stated legislative intent, it is appropriate to give the term its common or dictionary definition.⁹ As defined by the dictionary, "budget" means a statement of the financial position of a body for a definite period of time based on detailed estimates of planned or expected expenditures during the periods and proposals for financing them.¹⁰ In this sense, the agency's authority to determine its budget extends to the determination of the programs and the determination of the amounts required to fund them.

Under the Statute, therefore, an agency cannot be required to negotiate

⁸ See, for example, the statement of Congressman Clay, one of the proponents of the "Udall substitute," during the House debate on Title VII of the Civil Service Reform Act of 1978:

Congressman CLAY:

....

The Udall substitute contains a management rights clause substantially enlarged beyond that in the committee print. An important element in our agreeing to entrust such an expanded management rights clause to the hands of the new Authority is the example of the protection afforded the collective bargaining process by conscientious scrutiny of management claims of infringements on management rights, especially as found in the two 1978 decisions above. If the new Authority is faithful to these interpretative guidelines, the ultimate exercise of the specified managerial responsibility, the only subject exempted from the bargaining obligation, will be protected and the general obligation to bargain over conditions of employment will be unimpaired. However, it is essential that only those proposals that directly and integrally go to the specified management rights be barred from the negotiations. [Emphasis supplied.]

124 CONG. REC. H9638 (daily ed. Sept. 13, 1978).

See also the statement of Congressman Ford of Michigan, 124 CONG. REC. H9649 (daily ed. Sept. 13, 1978).

⁹ See National Treasury Employees Union and U.S. Customs Service, Region VIII, San Francisco, California, Case No. O-NG-3, 2 FLRA No. 30 (Dec. 13, 1979), Report No. _____ at 4 of the decision.

¹⁰ Webster's Third New International Dictionary (Unabridged) (1966).

those particular budgetary determinations. That is, a union proposal attempting to prescribe the particular programs or operations the agency would include in its budget or to prescribe the amount to be allocated in the budget for them would infringe upon the agency's right to determine its budget under section 7106(a)(1) of the Statute.

Moreover, where a proposal which does not by its terms prescribe the particular programs or amounts to be included in an agency's budget, nevertheless is alleged to violate the agency's right to determine its budget because of increased cost, consideration must be given to all the factors involved. That is, rather than basing a determination as to the negotiability of the proposal on increased cost alone, that one factor must be weighed against such factors as the potential for improved employee performance, increased productivity, reduced turnover, fewer grievances, and the like. Only where an agency makes a substantial demonstration that an increase in cost is significant and unavoidable and is not offset by compensating benefits can an otherwise negotiable proposal be found to violate the agency's right to determine its budget under section 7106(a) of the Statute.

Union Proposal I does not on its face prescribe that the agency's budget will include a specific provision for space and facilities for a day care center or a specific monetary amount to fund them. Furthermore, the agency has not demonstrated that Union Proposal I will in fact result in increased costs. On the contrary, the record is that the matter of the cost to the union for space and facilities is subject to further negotiation. It is not necessary, therefore, to reach the issue of whether the alleged costs are outweighed by compensating benefits. Consequently, Union Proposal I does not violate the right of the agency to determine its budget under section 7106(a) of the Statute.

Finally, it is noted that the agency has not adverted to problems which might arise in connection with implementation and administration of an agreement, should it include Union Proposal I, *vis a vis* provisions of applicable law and Government-wide rule or regulation¹¹ governing, e.g., the use or allocation of space. There, the Authority makes no ruling as to whether Union Proposal I is consistent with such law or regulation.

* * *

¹¹ Cf. Federal Property Management Regulations, 41 C.F.R. § 101-17.2.

In Fort Stewart Schools v. FLRA, 495 U.S. 461 (1990), the Supreme Court ruled that Fort Stewart had to bargain with the union over pay and certain fringe benefits where these items are not set by law and are within the discretion of the agency. The Court rejected the agency's argument that the proposals were not negotiable because they violated management's right to establish its budget. The Court found that the agency failed to prove that the proposals would result in "significant and unavoidable increases" in the budget.

(c) Organization. In the following case, it was held that a union proposal which would require an agency to create four, instead of two, sections in its American Law Division and mandates that each section be assigned a Section Coordinator, violates management's right to determine its organization.

**Congressional Research Employees Association
And The Library Of Congress
3 FLRA 737 (1980)**

(Extract)

* * *

Section 1 of the Union Proposal

Section 1 of the union's proposal requires the agency to create four sections instead of two in its American Law Division and mandates that each section be assigned a Section Coordinator.

Question Here Before the Authority

The question is whether Section 1 of the union's proposal violates the right of the agency to determine its organization under section 7106(a)(1) of the Statute,¹ as alleged by the agency.

Opinion

¹ Section 7106(a)(1) of the Statute provides, in pertinent part, as follows:

§ 7106. Management rights

(a) Subject to subsection (b) of this section, nothing in this chapter shall affect the authority of any management official of any agency--

- (1) to determine the . . . organization . . . of the agency [.]

Conclusion: Section 1 of the union's proposal violates management's right to determine its organization under Section 7106(a)(1) of the Statute.

Accordingly, pursuant to section 2424.10 of the Authority's rules and regulations, 5 C.F.R. § 2424.10 (1980), the agency's allegation that Section 1 of the union's proposal is not within the duty to bargain is sustained.

Reasons: Section 1 of the union's proposal states that "[t]he following organizational changes shall take place in the American Law Division . . ." and, that "[f]our sections for attorneys will be created in place of the present two." Thereafter, Section 1 would establish what sections will be part of the American Law Division and each section's substantive area of responsibility. Section 1 concludes by providing that "[e]ach section will have assigned to it a Section Coordinator."

The plain language of Section 1 would require the agency to adopt a certain organizational structure. Section 7106(a)(1), however, expressly reserves to management officials of any agency the right to determine the organization of the agency. Thus, Section 1 of the union's proposal clearly violates the agency's right under section 7106(a)(1) of the Statute to determine the "organization" of the agency. Hence, the agency's allegation that Section 1 of the union's proposal is not within the duty to bargain is sustained. . . .

In NTEU and IRS, 35 FLRA 398, 409-410 (1990), the Authority discussed the meaning of the term "determine its organization".

The right of an agency under section 7106(a)(1) to determine its organization refers to the administrative and functional structure of an agency, including the relationships of personnel through lines of authority and the distribution of responsibilities for delegated and assigned duties. (citations omitted). This right encompasses the determination of how an agency will structure itself to accomplish its mission and functions. This determination includes such matter as the geographic locations in which an agency will provide services or otherwise conduct its operations, and how various responsibilities will be distributed among the agency's organizational subdivisions, how an agency's organizational grade level structure will be designed, and how the agency will be divided into organizational entities such as sections.(footnotes omitted).

In DOD, NGB, Washington Army National Guard, Tacoma, and NAGE, 45 FLRA 782, 786 (1992), the Authority relied on the definition from NTEU and IRS to dismiss a union challenge to a decision by the National Guard to fill certain positions with military

personnel rather than with civilians. The Authority determined that filling the position with military personnel went to the right to determine how an agency's grade level organizational structure will be designed. A similar result was reached in DOD, NGB, Michigan Air National Guard, 48 FLRA 755 (1993).

(d) Number of Employees. In E.O. 11491, section 11(b) covered "the number of employees" and "the numbers, types, and grades of positions or employees assigned to an organizational unit, work project or tour of duty." Because both concepts (i.e., "the number of employees" and "the numbers . . . of employees assigned to an organizational unit, work project, or tour of duty") were embodied in section 11(b), cases did not distinguish between them. The August 1969, Study Committee Report which led to the issuance of E.O. 11491 did indicate the differences it had in mind. According to the Study Committee, there would be no obligation to bargain on:

an agency's right to establish staffing patterns for its organization and the accomplishment of its work - the number of employees in the agency and the number, types, and grades of positions or employees assigned in the various segments of its organization and to work projects and tours of duty. (Emphasis supplied)

Thus, "the number of employees" in § 7106(a) which is now a prohibited subject of bargaining, refers to the total number of employees in an agency, including its personnel ceiling, and/or managerial determinations of how many positions are to be filled within the ceiling. The activity or field installation is prohibited from negotiating on these matters within the activity or field installation. The prohibition applies to the total number of employees within a distinct organizational entity.

The "numbers, types, and grades of employees or positions assigned to any organizational subdivision, work project, or tour of duty," found in section 7106(b)(1) refers to the number of employees in an organizational subdivision. It is a permissive subject and will be discussed later.

A proposal which provided for a seven-day work period for unit employees for the purpose of computing overtime under section 7(k) of the Fair Labor Standards Act, did not violate management's right to determine the number of employees assigned, since nothing in the proposal required a change in either the number of unit employees assigned or a change in the already established work schedule. International Association of Fire Fighters, Local F-61 and Philadelphia Naval Shipyard, 3 FLRA 437 (1980).

(e) Internal Security Practices. In AFGE and Dep't of Veterans Affairs Medical Center Boston, Mass., 48 FLRA 41 (1993) the Authority discussed internal security practices.

An agency's right to determine its internal security practices under section 7106(a)(1) of the Statute includes the right to determine the policies and practices which are part of its plan to secure or safeguard its personnel, physical property, and operations against internal and external risks. (citations omitted). Where an agency shows a link or reasonable connection between its goal of safeguarding personnel or property and protecting its operations, and its practice or decision designed to implement that goal, a proposal which directly interferes with or negates the agency's practice or decision conflicts with the agency's right to determine internal security practices. (citations omitted).

To establish the necessary link, an agency must show a reasonable connection between its goal of safeguarding personnel or property and its practice designed to implement that goal. (citation omitted). Once a link has been established, the Authority will not review the merits of the agency's plan in the course of resolving a negotiability dispute. (citations omitted).

Id., at 44. (The Authority found a single union proposal relating to the use of rotating shifts for police officers to be nonnegotiable.)

Polygraph tests and similar investigative techniques may not be prohibited in collective bargaining agreement language because, said the FLRA, such practices relate to agencies' internal security and therefore are outside the duty to bargain. AFGE Local 1858 and Army Missile Command, Redstone Arsenal Alabama, 10 FLRA 440 (1982).

A proposal preventing the agency from towing any illegally parked car until efforts are made to locate the driver was found nonnegotiable in Ft. Ben. Harrison, 32 FLRA 990 (1988).

In NFFE and Army, 21 FLRA 233, the Authority found that a proposal concerning the financial liability of an employee for loss, damage, or destruction of property does not interfere with management's right to determine its internal security.

**National Federation Of Federal Employees, Local 29 and
DA, Kansas City District, Corps Of Engineers,**

21 FLRA 233 (1986)

(Extract)

I. Statement of the Case

This case is before the Authority because of a negotiability appeal under section 7105(a)(2)(E) of the Federal Service Labor-Management Relations Statute (the Statute) and concerns the negotiability of three Union proposals.

II. Union Proposal 1

The Employer recognizes that all employees have a statutorily created right to their pay, retirement fund and annuities derived therefrom.

The Employer further recognizes that charges/allegations of pecuniary liability shall not be construed to be indebtedness or arrears to the United States until the affected employee has had the opportunity to fully exercise his/her rights of due process; wherein due process shall provide equal protection to all employees and shall require a hearing before an unbiased, unprejudiced and impartial tribunal, free from any command pressure or influence. All claims by the Government for pecuniary liability shall be capped at a maximum of \$150.00. (Only the underlined portion is in dispute.)

A. Positions of the Parties

Union Proposal 1 would limit an employee's liability for the loss, damage to or destruction of government property to \$150.00, whereas, under the Agency's existing regulations, an employee's liability is now limited to an employee's basic monthly pay. The Agency has refused to negotiate over the proposal contending that the proposal is inconsistent with the Federal Claims Collection Act of 1966 ("Claims Act"), Pub. L. No. 89-508, 80 Stat. 309 (1966) and violates its management right to determine its internal security practices pursuant to section 7106(a)(1) of the Statute.

The Union disputes the Agency's contentions.

B. Analysis

1. Management Rights

In agreement with the Agency, the Authority finds that the proposal violates the Agency's right to establish its internal security practices pursuant to section 7106(a)(1) of the Statute. An agency's right to determine its internal security practices includes those policies and actions which are part of the agency's plan to secure or safeguard its physical property against internal or external risks, to prevent improper or unauthorized disclosure of information, or to prevent the disruption of the agency's activities. See American Federation of Government Employees, AFL-CIO, Local 32 and Office of Personnel Management, Washington, D.C., 14 FLRA 6 (1984) (Union Proposal 2), appeal docketed sub nom. Federal Labor Relations Authority v. Office of Personnel Management, No. 84-1325 (D.C. Cir. July 18, 1984). The Agency's plan as set forth in its regulation provides that an employee's pecuniary liability will be one month's pay or the amount of the loss to the Government, whichever is less. The Agency contends that this regulation acts as a deterrent and encourages employees to exercise due care when dealing with government property. Hence, it constitutes a management plan which is intended to eliminate or minimize risks to government property by making clear the consequences of property destruction, loss or damage, and is within the Agency's right to determine its internal security practices.¹

Even if, as the Union argues, the Agency's plan is designed primarily as a means of recouping government loss, in the Authority's view the Agency's statutory authority includes determining that the plan has, also, the effect of minimizing the risk of the loss occurring in the first place. Similarly, the Union's argument that the Agency's plan is not an effective deterrent is beside the point. It is not appropriate for the Authority to adjudge the relative merits of the Agency's determination to adopt one from among various possible internal security practices, where the Statute vests the Agency with authority to make that choice. In this regard, the Union's contention that its proposal limiting liability to \$150.00 is merely a procedural proposal under section 7106(b)(2) of the Statute is not persuasive. The proposal directly impinges on management's right to establish its internal security practices.

2. Inconsistent with Federal Law

The Claims Act specifically states that the Act does not diminish the existing authority of a head of an agency to litigate, settle, compromise

¹ See American Federation of Government Employees, AFL-CIO, Local 15 and Department of the Treasury, Internal Revenue Service, North Atlantic Region, 2 FLRA 874 (1980), in which the Authority found that a regulation, which directly related to and was part of the agency's plan to prevent disruption, disclosure or property destruction at its facilities, concerned the internal security practices of the agency.

or close claims.² Pursuant to 10 U.S.C. § 4831, et seq., the Secretary of the Army was vested with the existing authority to compromise, settle or close claims when the Claims Act was enacted.³

There is no provision in 10 U.S.C. § 4831 which limits the Secretary's right to settle, compromise or close claims in fulfilling his responsibilities under the Act. We find that insofar as the Secretary has unrestricted authority to close, settle and compromise on claims for destroyed or damaged property, the Union's proposal is not inconsistent with the Claims Act.

C. Conclusion

Based on the arguments of the parties, the Authority finds that Union Proposal 1 violates section 7106(a)(1) of the Statute and, thus, is outside the duty to bargain. We also find that the proposal is not inconsistent with the Federal Claims Collection Act.

[Discussion of Union Proposal II omitted. The Authority found that the provision, which would force the agency to choose between holding the employee liable or disciplining the employee, directly interfered with management's right to discipline employees under section 7106(a)(2)(A) and was outside the Agency's duty to bargain.]

The Army's civilian drug testing program, embodied in AR 600-85, directly affects its internal security. After considering a number of negotiability issues and appeals concerning drug testing, the Authority issued its lead opinion on the matter in 1988.

² Section 953 of the Federal Claims Collection Act provides as follows:

§ 953. Existing agency authority to litigate, settle, compromise, or close claims

Nothing in this chapter shall increase or diminish the existing authority of the head of an agency to litigate claims, or diminish his existing authority to settle, compromise, or close claims.

³ Section 4832 of title 10 of the U.S. Code provides as follows:

§ 4832. Property accountability: regulations

The Secretary of the Army may prescribe regulations for the accounting for Army property and the fixing of responsibility for that property.

**NFFE, Local 15, And U.S. Army Armament, Munitions and
Chemical Command Rock Island, Illinois**

30 FLRA 1046 (1988)

(Extract)

I. Statement of the Case.

This case is before the Authority because of a negotiability appeal filed under section 7105(a)(2)(D) and (E) of the Federal Service Labor-Management Relations Statute (the Statute). It presents issues relating to the negotiability of proposals concerning the Agency's testing of certain selected categories of civilian employees for drug abuse. For the reasons set forth below, we find that three proposals are within the duty to bargain and nine proposals are outside the duty to bargain.

Specifically, we find that Proposal 1, which provides for drug testing of employees only on the basis of probable cause or reasonable suspicion, is outside the duty to bargain under section 7105(a)(1) of the Statute because it directly interferes with management's right to determine its internal security practices and is not a negotiable appropriate arrangement under section 7106(b)(3). Proposal 2, providing that tests and equipment used for drug testing be the most reliable available, we find to be nonnegotiable under section 7106(a)(1) of the Statute because it directly interferes with management's right to determine its internal security practices and is not an appropriate arrangement under section 7106(b)(3). . . .

II. Background

A. The Army Drug Testing Program.

On April 8, 1985, the Department of Defense issued DOD Directive 1010.9, "DOD Civilian Employees Drug Abuse Testing Program." On February 10, 1986, the Department of the Army promulgated regulations implementing the DOD Directive. Interim Change No. I11 to Army Regulation 600-85, Alcohol and Drug Abuse Prevention and Control Program ("Interim Change to AR 600-85" or "amended regulation"). The proposals in dispute in this case arose in connection with impact and implementation bargaining over paragraph 5-14 of the Interim Change to AR 600-85.

Paragraph 5-14 states that the Army has established a drug abuse testing program for civilian employees in critical jobs.

* * *

[C]ivilian employees in jobs designated as critical, as well as prospective employees being considered for critical jobs, will be screened under the civilian drug testing program. *Id.* at paragraph 5-14c(1). Current employees in these critical positions are subject to urinalysis testing in three situations: (1) on a periodic, random basis; (2) when there is probable cause to believe that an employee is under the influence of a controlled substance while on duty; and (3) as part of an accident or safety investigation. *Id.* at paragraph 5-14e. Prospective employees for selection to critical positions will be tested "prior to accession." *Id.* These requirements are considered to be a condition of employment. *Id.* . . .

The National Federation of Federal Employees, Local 15 (the Union) represents a bargaining unit of civilian employees at the U.S. Army Armament, Munitions and Chemical Command, Rock Island, Illinois (the Agency). The Union submitted collective bargaining proposals regarding the implementation of the amended regulation as to unit employees. The Agency alleged that 12 of the proposals are outside the duty to bargain under the Statute. On May 2, 1986, the Union filed with the Authority a petition for review of the Agency's allegation of nonnegotiability.

B. Events Subsequent to the Filing of the Instant Petition for Review

1. Executive Branch and Congressional Actions

* * *

On September 15, 1986, President Reagan issued Executive Order 12564, entitled "Drug-Free Federal Workplace." See 51 Fed. Reg. 32889 (Sept. 17, 1986). Section 3 of the Executive Order directs the head of each Executive agency to establish mandatory and voluntary drug testing programs for agency employees and applicants in sensitive positions. Section 4(d) authorizes the Secretary of Health and Human Services (HHS) to promulgate scientific and technical guidelines for drug testing programs, and requires agencies to conduct their drug testing programs in accordance with these guidelines once promulgated. Section 6(a)(1) states that the Director of the Office of Personnel Management (OPM) shall issue "government-wide guidance to agencies on the implementation of the terms of [the] Order[.]". Section 6(b) provides that "[t]he Attorney General shall render legal advice regarding the implementation of this

Order and shall be consulted with regard to all guidelines, regulations, and policies proposed to be adopted pursuant to this Order."

On November 28, 1986, OPM issued Federal Personnel Manual (FPM) Letter 792-16, "Establishing a Drug-Free Federal Workplace." Section 2(c) of the letter states: "Agencies shall ensure that drug testing programs in existence as of September 15, 1986, are brought into conformance with E.O. 12564." Sections 3, 4, and 5 of the FPM Letter are entitled, respectively, "Agency Drug Testing Programs," "Drug Testing Procedures," and "Agency Action Upon Finding that an Employee Uses Illegal Drugs."

* * *

On February 13, 1987, HHS issued "Scientific and Technical Guidelines for Drug Testing Programs" (Guidelines) as directed in the Executive Order. Thereafter, the Supplemental Appropriations Act of 1987, Pub. L. No. 100-71, 101 Stat. 391, 468 (July 11, 1987) was enacted. Section 503 of that Act required notice of the Guidelines to be publicized in the Federal Register. Notice of the Guidelines was published on August 14, 1987, and interested persons were invited to submit comments.⁴ See 52 Fed. Reg. 30638 (Aug. 14, 1987). As of the date of this decision, final regulations have not been published in the Federal Register.

* * *

III. Proposal 1.

Section II - Frequency of Testing

The parties agree that employees in sensitive positions defined by AR 600-85 may be directed to submit to urinalysis testing to detect presence of drugs only when there is probable cause to suspect the employees have engaged in illegal drug abuse.

A. Positions of the Parties

The Agency contends that this proposal conflicts with its right to determine its internal security practices under section 7106(a)(1) of the Statute. According to the Agency, it has determined that as part of its program to test employees in certain critical positions, these tests must be conducted periodically without prior announcement to employees. The Agency contends that the proposal would expressly limit the Agency's

⁴ Pub. L. No. 100-71 placed certain restrictions on the use of appropriated funds for drug testing of civilian employees. The Department of the Army's drug testing program is temporarily exempted from those restrictions. Section 503(b)(1)(C).

right to randomly test employees and would impermissible place a condition of "probable cause" on the Agency before the right could be exercised.

* * *

The Union contends that the proposal involves conditions of employment and that the Agency has failed to provide any evidence linking testing for off-duty drug use to internal security. The Union also argues that the Agency has not adequately shown that it has a compelling need for the amended regulation. Finally, the Union asserts that even if the proposal infringes on an internal security practice, it is negotiable as an appropriate arrangement. The Union contends that this proposal is intended to address the harms that employees will suffer, such as invasion of privacy and the introduction of an element of fear into the workplace, by eliminating the random nature of the testing and substituting a test based on probable cause.

In its supplemental submission, the Union contends that proposals stating that there should be testing of civilian employees for drug use only when there is probable cause do not conflict with Executive Order 12564.

The Union also argues that its proposals are consistent with section 3(a) of the Executive Order, which provides that the extent to which employees are tested should be determined based on "the efficient use of agency resources," among other considerations. Union's Supplemental Submission of September 18, 1987, at 2.

B. Discussion

* * *

2. Whether Proposal 1 Directly Interferes with Management's Right to Determine its Internal Security Practices under section 7106(a)(1)

In our view, the proposal directly interferes with management's right to determine its internal security practices under section 7106(a)(1) of the Statute. By restricting the circumstances in which employees will be subject to the drug testing program, the proposal has the same effect as Proposal 2 in National Association of Government Employees, SEIU, AFL-CIO and Department of the Air Force, Scott Air Force Base, Illinois, 16 FLRA No. 57 (1984). The proposal in that case prohibited management from inspecting articles in the possession of employees unless there were reasonable grounds to suspect that the employee had stolen something and was intending to leave the premises with it. The Authority concluded that by restricting management's ability to conduct unannounced searches of employees and articles in their possession, the

proposal directly interfered with management's plan to safeguard its property.

Similarly, by limiting management's ability to conduct random testing for employee use of illegal drugs, Proposal 1 directly interferes with management's internal security practices. As the Agency indicated in issuing the Interim Change to AR 600-85, one purpose for instituting the drug testing program is to identify "individuals whose drug abuse could cause disruption in operations, destruction of property, threats to safety for themselves and others, or the potential for unwarranted disclosure of classified information through drug-related blackmail." Interim Change to AR 600-85, Paragraph 5-14a(3). Clearly, the drug testing program set forth in the Agency regulation, including the provision for unannounced random tests, Interim Change to AR 600-85, Paragraph 5-14e(1)(b), concerns the policies and actions which are a part of the Agency's plan to secure or safeguard its physical property against internal and external risks, to prevent improper or unauthorized disclosure of information, or to prevent the disruption of the Agency's activities.

The Agency has decided, in the Interim Change to AR 600-85, Paragraph 5-14e(1)(b), to use random testing as a part of its plan to achieve those purposes because such testing by its very nature contributes to that objective. Unannounced random testing has a deterrent effect on drug users and makes it difficult for drug users to take action to cover up their use or otherwise evade the tests. See, for example, Agency's Supplemental Statement of Position of June 30, 1986 at 2. As such, the use of random testing constitutes an exercise of management's right to determine its internal security practices. See also National Federation of Federal Employees, Local 29 and Department of the Army, Kansas City District, U.S. Army Corps of Engineers, Kansas City, Missouri, 21 FLRA 233, 234 (1986), vacated and remanded as to other matters *sub nom.* NFFE, Local 29 v. FLRA, No. 86-1308 (D.C. Cir. Order Mar. 6, 1987), Decision on Remand, 27 FLRA No. 56 (1987).

We will not review the Agency's determination that the establishment of a drug testing program involving random tests for the positions which it has identified as sensitive positions is necessary to protect the security of its installations. As indicated above, the purpose of the Interim Change to AR 600-85 is to prevent the increased risk to security which the Agency has identified as resulting from drug use by employees in those sensitive positions. That is a judgment which is committed to management under section 7106(a)(1) of the Statute. Where a link has been established between an agency's action--in this case random drug testing--and its expressed security concerns, we will not review the merits of that action. We find that such a linkage is present

in this case. See also the Preamble to Executive Order 12564 and section 1 of FPM Letter 792-16.

This case is not like Department of Defense v. FLRA, 685 F.2d 641 (D.C. Cir. 1982). In that case, the court concluded that there was no "connection" between the proposal at issue and the agency's determination of the internal security practices. Rather, this case is similar to Defense Logistics Council v. FLRA, 810 F.2d 234 (D.C. Cir. 1987). In that case, the Authority found that proposals pertaining to the agency's program to prevent drunk driving were nonnegotiable because they directly interfered with management's right to determine its internal security practices under section 7106(a)(1). In upholding that decision, the U.S. Court of Appeals for the District of Columbia Circuit rejected the claim that the drunk driving program did not involve internal security practices. The court concluded that the Authority's interpretation of the term "internal security practices" to include preventive measures designed to guard against harm to property and personnel caused by drunk drivers was a reasonable disposition of that issue. In reaching that conclusion, the court specifically distinguished the Department of Defense decision. We see no material difference between the Agency's drug testing program and the drunk driving program.

* * *

IV. Proposal 2

Section III.A - Testing Methods and Procedures

- A. The parties agree that methods and equipment used to test employee urine samples for drugs be the most reliable that can be obtained.

A. Positions of the Parties

The Agency asserts that the proposal concerns the methods, means, or technology of performing its work, within the definition of section 7106(b)(1) of the Statute, of assuring, through random drug testing, the fitness of certain employees in critical positions. The Agency contends that by restricting and qualifying the methods and equipment used by the Agency in performing its work, the proposal interferes with the Agency's right under section 7106(b)(1). The Agency also contends that the proposal is not negotiable because it concerns techniques used by the Agency in conducting an investigation relating to internal security and therefore falls within management's right to determine internal security

practices under section 7106(a)(1). Finally, the Agency contends that the proposal is not a negotiable appropriate arrangement.

The Union contends that the proposal concerns the methods and equipment used to test employee urine samples, and does not concern the technology, methods, and means of performing work within section 7106(b)(1) because drug testing is not the work of the Agency. The Union also argues that the proposal does not concern the Agency's internal security practices since urinalysis testing bears no relationship to employee performance or conduct at the workplace. Finally, the Union argues that the proposal is an appropriate arrangement because the proposal assures that the most accurate testing methods and equipment will be used.

B. Discussion

1. Whether Proposal 2 Directly Interferes with Management's Right to Determine its Internal Security Practices under section 7106(a)(1)

An integral part of management's decision to adopt a particular plan for protecting its internal security as its determination of the manner in which it will implement and enforce that plan. For example, where management establishes limitations on access to various parts of its operations, it may use particular methods and equipment to determine who may and who may not be given access, such as coded cards and card reading equipment. Polygraph tests may be used as part of management's plan to investigate and deter threats to its property and operations. See American Federation of Government Employees, Local 32 and Office of Personnel Management, 16 FLRA 40 (1984); American Federation of Government Employees, AFL-CIO, Local 1858 and Department of the Army, U.S. Army Missile Command, Redstone Arsenal, Alabama, 10 FLRA 440, 444-45 (1982). Similarly, an integral aspect of establishing its drug testing program is management's decision as to the methods and equipment it will use to determine whether employees have used illegal drugs. Put differently, it is not possible to have a program of testing for illegal drugs use by employees without determining how the proposed tests are to be conducted. Management's determination of the methods and equipment to be used in drug testing is an exercise of its right to determine its internal security practices under section 7106(a)(1) of the Statute.

Proposal 2 requires management to use the most reliable testing methods and equipment in the implementation of its drug testing program. The proposal establishes a criterion governing management's selection of

the methods and the equipment to be used in any and all aspects of the testing program. It is broadly worded and does not distinguish between the particular parts or stages of the program or the purposes for which the tests and equipment would be used. The effect of the proposal is to confine management's selection of methods and equipment for use at any stage of the testing procedure only to those which are the most reliable. In short, management would be precluded from selecting equipment or methods which are reliable for a particular purpose if there are equipment and methods which were more reliable for that purpose.

By limiting the range of management's choices as to the methods and equipment it may use to conduct drug tests--regardless of the particular phase of the testing process or the purpose of the test--Proposal 2 establishes a substantive criterion governing the exercise of management's determination of its internal security practices. Generally speaking, the most accurate and reliable test at this time for confirming the presence of cocaine, marijuana, opiates, amphetamines, and phencyclidine (PCP) is the gas chromatography/mass spectrometry (GC/MS) test. See the proposed Guidelines, 52 Fed. Reg. 30640. As indicated above, the plain wording of Proposal 2 would therefore appear to require the use of that test at all stages of the drug testing program. See Union Response to Agency Statement of Position at 9. It would preclude the use, for example, of the less reliable immunoassay test at any stage or for any purpose, including as an initial screening test. We find, therefore, that the proposal directly interferes with management's rights under section 7106(a)(1) of the Statute and is outside the duty to bargain unless, as claimed by the Union, it is an appropriate arrangement under section 7106(b)(3).

* * *

A narrow majority of Supreme Court Justices approved the drug testing of custom service employees seeking jobs in drug interdiction or which require the use of firearms. The Justices held that the test did not violate the 4th amendment prohibition against unreasonable government search and seizure, despite an absence of "individual suspicion". NTEU vs. Von Raab, 489 U.S. 656 (1989). Also, in a companion case, the court held that drug and alcohol testing of railway train crew members involved in accidents is legal. This case holds that general rules requiring testing "supply an effective means of deterring employees engaged in safely-sensitive task from using controlled substance or alcohol in the first place," Skinner v. Railway Labor Executives' Association, 489 U.S. 602 (1989). The Army's drug testing program was sustained in Thomson v. Marsh, 884 F.2d 113 (4th Cir. 1989). The court relied upon the Supreme Court's decisions in Skinner and Von Raab. In Aberdeen Proving Ground

v. FLRA, 890 F.2d 467 (D.C. Cir. 1989) the D.C. Circuit held that proposals concerning split samples are not negotiable.

In International Federation of Professional and Technical Engineers and Norfolk Naval Shipyard, 49 FLRA 225 (1994), the FLRA held that a union proposal to provide one hour advance notice to employees of upcoming drug tests was nonnegotiable because it interferes with management's right to determine internal security practices.

2. In Accordance with Applicable Laws - To Hire, Assign, Direct, Layoff, and Retain Employees in the Agency, or To Suspend, Remove, Reduce in Grade or Pay, or Take Other Disciplinary Action Against Such Employees (5 U.S.C. § 7106(a)(2)(A)).

(a) To Hire Employees. In Internal Revenue Service, 2 FLRA 280 (1979), the Authority held that the portion of an upward mobility proposal requiring that a certain percentage of positions be filled was violative of section 7106(a)(2)(A). The FLRA said:

This requirement would violate management's reserved authority under section 7106(a)(2)(A) ... to "hire" and "assign" employees or to decide not to take such actions.

However, the Authority ruled that the portion of the proposal requiring management to announce a certain percentage of its vacancies as upward mobility positions was found to be a negotiable procedure. The agency had argued that the proposal would require it to perform a potentially useless act, thereby causing unreasonable delay when the agency decided to fill the positions as other than upward mobility positions or decided not to fill them at all. The Authority, invoking the "acting at all" doctrine it employed in Fort Dix, 2 FLRA 152 (1979), found the "unreasonable delay" argument without dispositive significance.

In Fort Bragg Ass'n of Educators v. FLRA, 870 F.2d 698 (D.C. Cir. 1989), the court looked at the negotiability of a union proposal that teachers in DODDS not be required to sign personal service contracts (PSC) as a condition of employment. The court overturned the FLRA's ruling that the proposal was nonnegotiable because it interfered with management's right to hire under § 7106(a)(2)(A). The court said that the PSC was not an interference with the decision to hire, it was only the procedure that the Army used to record the terms of the appointment. Procedures are subject to bargaining under § 7106(b)(2). The court also cited a Second Circuit decision which held that the use of PSC was unlawful. If the use of PSC is unlawful, then the Army was not hiring in accordance with applicable law as required by § 7106(a)(2). (On remand, the Authority ordered the Army to bargain. NEA and Fort Bragg Schools, 34 FLRA 18 (1989)).

(b) To Assign Employees. The right to "assign employees" applies to moving employees to particular positions and locations.

**AFGE, Local 987 and
Air Force Logistics Center, Robins AFB, Georgia**

35 F.L.R.A. 265 (1990)

(Extract)

I. Statement of the Case

This case is before the Authority based upon a negotiability appeal filed under section 7105(a)(2)(E) of the Federal Service Labor-Management Relations Statute (the Statute). It concerns the negotiability of three proposals which require the Agency to make reassessments based on volunteers or, in the event that there is an insufficient number of volunteers, inverse order of seniority. A section of one of the proposals also permits employees who are involuntarily reassigned to transfer back to their previous positions after 120 days. The Agency filed a Statement of Position in support of its contention that the proposals are nonnegotiable. The Union did not file a Response to the Agency's Statement of Position, although the Authority granted the Union's request for an extension of time to file a response. For the reasons which follow, we find that the proposals are nonnegotiable because they interfere with management's rights to assign employees and assign work under section 7106(a)(2)(A) of the Statute.

II. Background

The Warner Robins Air Force Logistics Center, Directorate of Maintenance, employs 7,000 employees in 6 divisions. This case involves three proposals submitted in response to three "planned reassessments/reorganizations within the Aircraft, Industrial Products, and Electronics Divisions," as described below. Agency Statement of Position at 2.

First, to accommodate "a decrease in workload in the Electronics Division and an increase in workload in the Aircraft Division," management "proposed the reassignment of 47 employees from the Production Branch of the Electronics Division (MAI) to the Production Branch of the Aircraft Division (MAB)." Id. The reassignment involved relocation to a new building, new position descriptions and different work,

performance standards and supervisors. Id. According to the Agency, the selections of employees for these positions were based on "qualifications, the need for services in the gaining/losing organizations, and other standard managerial considerations." Id.

Second, to shift "only the responsibility for the work" from the Aircraft Division to the Industrial Products Division, management proposed the reassignment of approximately 80 employees from the Production Branch of the Aircraft Division to the Production Branch of the Industrial Products Division. There was no physical move and there were "no significant changes in the employees' duties and responsibilities, supervisors, etc." Id. at 3. [Emphasis in original.]

Third, "to more efficiently organize the workload to enhance the utilization of some 66 employees," management proposed reorganization of the Scheduling Branch in the Aircraft Division. Id. at 2. "The employees did not physically move nor was there any change in duty, hours, title, grade, or series, etc. The only significant change was in supervisory assignments and the flow of the workload." Id.

III. Proposals

Proposal 1

MAI PERSONNEL FILLING MAB AIRCRAFT ELECTRICIAN POSITIONS

With respect to the MAI employees that are to fill the Aircraft Electrician slots in MAB, it is agreed that the positions will first be offered to volunteers. In the event that there are more volunteers than slots available in MAB, the volunteers with the most seniority (SCD) Service Computation Date, will be permitted the slots. In the event that there are insufficient volunteers to fill the MAB slots, the MAI employees with the least seniority (SCD) will fill the slots.

Proposal 2 . . .

(4) After 120 days a drafted employee will be permitted a lateral transfer back to the MAB Division.

Proposal 3

It is agreed by the parties that the staffing of both Material Support Unit (MSU) and Production Support Unit (PSU) will be done in the following manner:

- (1) Solicit Volunteers from all the employees involved.
- (2) If more volunteers are obtained than actual available positions, the volunteers will fill the slots in order of seniority.
- (3) If not enough volunteers are obtained the positions will be filled by drafting in inverse order of seniority until all required positions are filled.

It is further agreed that staffing of multiple shifts will be staffed IAW Article 1 of the Local Supplement to the MLA and overtime assignments will be filled IAW Article 5 of the Local Supplement to the MLA.

IV. Positions of the Parties

The Union states that the intent of the proposals is to apply the procedures established in the parties' master labor agreement governing the assignment to overtime, details, loans and temporary duty (TDY) to the reassessments and reorganization proposed by the Agency. Union's Petition for Review at 4. The Union claims that it "has no interest in determining the qualifications; whether or not the [Agency] uses competitive procedures; which positions to fill, if any; the numbers, grades or types; or any other management right provided by 5 U.S.C. § 7106." Id. The Union further argues that the proposals are consistent with law and regulation because they would apply within the context of the parties' master labor agreement and local supplemental agreement, which require compliance with all applicable laws and regulations. Id. The Union further argues that if the proposals are found to interfere with management's rights, they constitute appropriate arrangements, and/or negotiable procedures for employees affected by the exercise of those rights. Id.

* * *

The Agency argues that the proposals are nonnegotiable because they conflict with management's rights to assign employees and to assign work. It asserts that the proposals interfere with the Agency's right to determine: (1) which employee will be assigned; (2) the skills and qualifications needed for the position; and (3) whether employees possess the necessary skills and qualifications. The Agency argues that Proposal 2 also interferes with management's right to assign work because it interferes with management's right to determine the duration of the assignment. Agency Statement of Position at 9-10. Lastly, the Agency argues that Proposal 3 concerns the duties the "[A]gency will assign to an employee and under whose supervision the employees will work, matters within the province of the Agency." Agency Statement of Position at 11.

V. Analysis and Conclusions

The right to assign employees under section 7106(a)(2)(A) encompasses the right to make assignments of employees to positions. For example, American Federation of Government Employees, AFL-CIO, Local 738 and Department of the Army, Combined Arms Center and Fort Leavenworth, Fort Leavenworth, Kansas, 33 FLRA 380 (1988) (Combined Arms Center); and Fort Knox Teachers Association and Fort Knox Dependent Schools, 25 FLRA 1119 (1987) (Fort Knox Dependent Schools), *reversed as to other matters sub nom. Fort Knox Dependent Schools v. FLRA*, 875 F.2d 1179 (6th Cir. 1989), *petition for cert. filed*, 58 U.S.L.W. 3353 (U.S. Nov. 7, 1989) (No. 89-736). This right includes: (1) making reassessments as well as "initial" assignments; (2) determining the particular qualifications and skills needed to perform the work of the position, including such job-related individual characteristics as judgment and reliability; and (3) determining whether employees meet those qualifications. *Id.*

In Combined Arms Center, the Authority held that a proposal which required the agency to reassign either a volunteer or the least senior employee from among those in positions affected by a realignment of an engineering technician position from one division to another was nonnegotiable. The Authority found that the proposal directly interfered with management's right to assign employees because it did "not allow the Agency to make any judgment on the qualifications of those employees, relative to each other or to other employees, to perform the work of the position in [the gaining division]." 33 FLRA at 382. See also, Naval Air Rework Facility, Jacksonville, Florida and National Association of Government Inspectors and Quality Assurance Personnel, 27 FLRA 318 (1987) (arbitration award could not properly enforce a collective bargaining agreement so as to deny an agency the authority to assign employees to different shifts for cross-training purposes).

In some circumstances, there is a duty to bargain over the procedure for determining which one of two or more employees who perform the same work will be selected for an assignment or reassignment. Such a procedure is negotiable only to the extent that it applies "when management finds that two or more employees are equally qualified for an assignment." [Emphasis in original.] Combined Arms Center, 33 FLRA at 383 *citing Overseas Education Association, Inc. and Department of Defense Dependents Schools*, 29 FLRA 734, 793 (1987) (proposal to use seniority as a tie breaker where two or more employees are equally qualified and capable of performing held negotiable), *aff'd mem. as to other matters sub nom. Overseas Education Association, Inc. v. FLRA*, 872 F.2d 1032 (D.C. Cir. 1988).

For example, where management establishes more than one shift during which the same work is performed and the employees have the required qualifications and skills to perform the duties, a proposal concerning which employees will be assigned to various shifts is negotiable. Laborers' International Union of North America, AFL-CIO-CLC, Local 1267 and Defense Logistics Agency, Defense Depot Tracy, Tracy, California, 14 FLRA 686, 687 (1984) (proposal to offer vacancies on Monday through Friday shift to most senior "otherwise qualified" employees on irregular shifts held negotiable). Similarly, where management determines that it is necessary for some employees to perform the duties of their positions at a different location, and that the employees management determines have the required qualifications and skills, a proposal concerning which of those employees who are assigned to the positions will do the work does not conflict with an agency's right to assign employees. National Treasury Employees Union and Internal Revenue Service, 28 FLRA 40, 43 (1987) (proposal to assign certain home office rather than field-located work to union officials held negotiable); American Federation of Government Employees, AFL-CIO and Air Force Logistics Command, Wright-Patterson Air Force Base, Ohio, 5 FLRA 83 (1981) (proposal to assign temporary duty in a different geographical area based on seniority held negotiable).

In the present case, Proposals 1, 2, and 3 require the Agency to reassign volunteers or, if there are too many or not enough volunteers, to use seniority as the criterion for reassignment. Management has not determined that the employees involved are equally qualified for the assignments as discussed above. To the contrary, the Agency asserts that the proposals require it to reassign the employees "without regard for the skills and qualifications needed to do the work as well as such job related characteristics as judgment and reliability." Agency Statement of Position at 8-9.

By requiring volunteers or seniority to be determinative of which employees will be reassigned, Proposals 1, 2, and 3 prevent the Agency from exercising its judgment concerning the qualifications of the reassigned employees to perform the work of the new positions. Therefore, we find that Proposals 1, 2, and 3 directly interfere with the Agency's right to assign employees by preventing the Agency from assigning only employees whom it determines possess the qualifications and skills needed for the "planned reassignment/reorganizations within the Aircraft, Industrial Products, and Electronic Divisions." Agency Statement of Position at 2. See, for example, Combined Arms Center; and Fort Knox Dependent Schools.

The wording in Proposal 2, which restricts employees who volunteer to those who possess "the desired grades and skills," does not render the proposal negotiable. By requiring the Agency to reassign volunteers from other sections within the MAB Division who possess "the desired grades and skills," the proposal precludes the Agency from taking into consideration the particular needs of the various sections and divisions within the Agency. Proposals which have the effect of forcing an agency to reassign employees to certain positions irrespective of organizational or mission requirements directly interfere with management's right to assign employees under the Statute and are outside the duty to bargain. See, for example, International Brotherhood of Electrical Workers, Local 2080 and Department of the Army, U.S. Army Engineer District, Nashville, Tennessee, 32 FLRA 347, 357 (1988) (Provisions 3 and 4, which required management to fill vacancies with internal candidates from organizational units or classifications having a surplus of employees, directly interfered with management's right to assign employees); and American Federation of Government Employees, Local 85 and Veterans Administration Medical Center, Leavenworth, Kansas, 32 FLRA 210, 217 (1988) (Proposal 11, which required the agency to assign either all or none of several particular employees to certain positions, directly interfered with management's right to assign employees under the Statute).

In addition, Section 4 of Proposal 2 interferes with management's rights to assign employees and assign work because it prevents the Agency from determining the duration of assignments. Deciding when an assignment begins and ends is inherent in the right to assign employees under section 7106(a)(2)(A). See American Federation of Government Employees, AFL-CIO, Local 916 and Tinker Air Force Base, Oklahoma, 7 FLRA 292 (1981) (Provision II, restricting certain details to 60 days, found nonnegotiable). See also, Tidewater Virginia Federal Employees Metal Trades Council, AFL-CIO and Norfolk Naval Shipyard, 31 FLRA 131, 139-40 (1988) (provision restricting agency's ability to assign an employee to a detail for more than 90 days in a calendar year held nonnegotiable). Section 4 of Proposal 2 permits employees to transfer back to their former position after 120 days. This section prevents the Agency from determining the duration of a particular assignment and, thereby, directly interferes with management's rights to assign employees and assign work.

* * *

Accordingly, we find that Proposals 1, 2, and 3 directly interfere with management's rights to assign employees and assign work and that the Union has not provided a basis for determining that any of these proposals are negotiable as appropriate arrangements. Therefore, Proposals 1, 2, and 3 are outside the duty to bargain.

VI. Order

The petition is dismissed.

In the multi-issue AFLC case, 2 FLRA 604 (1979), the Authority found that proposals requiring the selection of a particular individual for a temporary assignment on the basis of seniority directly interfered with the right of an agency to assign employees. In this regard, the Authority stated (at p. 10 of the decision):

The right to assign employees in the agency under section 7106(a)(2)(A) of the Statute is more than merely the right to decide to assign an employee to a position. An agency chooses to assign an employee to a position so that the work of that position will be done. Under 7106(a)(2)(A) of the Statute, the agency retains discretion as to the personnel skills needed to do the work, as well as such job-reliability. Therefore, the right to assign an employee to a position includes the discretion to determine which employee will be assigned. [Emphasis added.]

Given the Authority's interpretation of management's right to assign employees, the Authority found a number of proposals requiring that seniority be used in determining which employee is to be assigned to a position violative of Section 7106(a)(2)(A). They included a requirement that seniority be used in detailing employees to lower-graded positions, in detailing employees to positions outside the unit, and reassigning employees to other duty stations.

On the other hand, the Authority held that a proposal which required management to use seniority in detailing employees to higher- or equal-graded positions, when management elects not to use competitive procedures, was negotiable.

Other proposals found to interfere with management's right to assign employees to positions include:

1. Requiring that an employee be granted administrative leave four times to the extent necessary to sit for any bar or CPA examination. NTEU and Dep't of Treasury, 39 FLRA 27 (1991).

2. Requiring appraiser to be at least one grade level above the employee to be appraised and to have consistently monitored the employee's work performance. Professional Airways Systems Specialist and Dep't of Navy, 38 FLRA 149 (1990).

3. Requiring the length of an assignment to phone duty be for no more than one day. AFGE and Dep't of Labor, 37 FLRA 828 (1990).

(c) To Direct Employees.

The right to direct employees in the agency is not defined in the statute, is not specifically discussed in the legislative history and has not been applied in prior decisions of the Authority. Therefore, consistent with the main purpose and meaning of the Statute and in the absence of any indication the phrase as used in the Statute has a meaning other than its ordinary meaning, the right "to direct . . . employees in the agency" means to supervise and guide them in the performance of their duties on the job.

NTEU and Dep't of the Treasury, Bureau of Public Debt, 3 FLRA 769, 775, (1980).

The Authority held that a proposal to establish a particular critical element and performance standard would directly interfere with the exercise of management's rights to direct employees and to assign work under section 7106(a)(2)(A) and (B) of the Statute and, therefore, was not within the duty to bargain. *Id.*

A number of cases have addressed a variety of similar proposals concerning the criteria management uses to determine job critical elements and performance standards. In all these cases, the FLRA has held that these proposals are not negotiable because they would curtail management's unlimited right to assign and direct work. See, NTEU and Dept. of HHS, 7 FLRA 727 (1983); AFGE Local 1968 and DOT St. Lawrence Seaway, 5 FLRA 70 (1981), *aff'd sub. nom. AFGE v. FLRA*, 691 F.2d 565 (D.C. Cir. 1982). But, union proposals that mandate discussions between managers and employees of performance appraisals before the evaluations go to a reviewing official are negotiable. Such advance discussions do not interfere with management's decision making processes or any other aspect of its reserved right to direct employees and assign work. NFFE and Dept. of the Army, Fort Monmouth, N.J., 13 FLRA 426 (1983).

The Authority recently reiterated these rules in AFGE and HHS, SSA District Office, Worcester, Mass., 49 FLRA 1408, (1994).

(d) To Suspend, remove, reduce in grade or pay, or take other disciplinary action.

National Federation Of Federal Employees, Local 1438 and

**U.S. Department Of Commerce, Bureau Of The Census,
Jeffersonville, Indiana**

47 FLRA 812 (1993)

(Extract)

I. Statement of the Case

This case is before the Authority on a negotiability appeal filed by the Union under section 7105(a)(2)(E) of the Federal Service Labor-Management Relations Statute (the Statute). The appeal concerns the negotiability of one provision of a collective bargaining agreement that was disapproved by the Agency head under section 7114(c) of the Statute. The provision concerns the timeliness with which management effectuates disciplinary actions against employees. For the following reasons, we find that the provision is negotiable.

II. Provision

Article 17, Section 17.4, second paragraph

The employee will be given up to 3 workdays to respond to the charge(s). If discipline is not warranted, the record of infraction will be destroyed and the employee or representative, if any, will be notified immediately. If discipline is warranted, branch management will make a timely decision following the employee's response and return a copy of the record of infraction to the employee or representative, if any. In the case of oral admonishments, they will be decided upon at the branch level. All remaining actions listed in 17.1 and 17.2 above will be forwarded to the Personnel Management Staff where an expeditious recommendation for appropriate discipline will be made. [Only the underscored portions are in dispute.]

III. Positions of the Parties

A. Agency

The Agency interprets the provision as requiring that management's initial decision that discipline is warranted be timely and that the recommendation by the Personnel Management Staff for appropriate discipline be expeditious. According to the Agency, under the provision, if an arbitrator concluded that management did not timely decide that discipline was warranted or that a recommendation of

appropriate discipline was not expeditious, the arbitrator could revoke the discipline. The Agency claims that such an arbitrator's award would have the effect of establishing a statute of limitations and would directly interfere with management's right under section 7106(a)(2)(A) of the Statute to take disciplinary action against employees.

The Agency asserts that a contractual statute of limitations on the initiation of disciplinary action is nonnegotiable because it precludes management from exercising its right to discipline employees under section 7106(a)(2)(A) of the Statute. The Agency cites, among others, the Authority's decisions in Antilles Consolidated Education Association and Department of Defense, Office of Dependents Schools, Antilles Consolidated School System, Fort Buchanan, Puerto Rico, 45 FLRA 989 (1992) (Antilles) and American Federation of Government Employees, AFL-CIO, Local 3732 and U.S. Department of Transportation, United States Merchant Marine Academy, Kings Point, New York, 39 FLRA 187, 201 (1991) (Merchant Marine Academy). Specifically, the Agency notes that, in Merchant Marine Academy, the Authority rejected "a [u]nion's explanation that a contractual provision was merely intended to assure timely notice to employees and that untimeliness would not require that the action be set aside, unless there was 'harmful error'[,]" Statement at 6.

The Agency states that, notwithstanding the union's explanation, the Authority found that the provision imposed a statute of limitations on discipline and, therefore, was nonnegotiable.

The Agency acknowledges that, in National Treasury Employees Union and U.S. Department of Agriculture, Food and Nutrition Service, Western Region, 42 FLRA 964, 988-90 (1991) (Food and Nutrition Service), the Authority found that a provision containing a timeliness limitation on management's right to discipline that was phrased in general terms, rather than specifying a specific number of days, was negotiable. The Agency also notes that the decision in Food and Nutrition Service cited National Federation of Federal Employees, Local 1853 and U.S. Attorney's Office, Eastern District of New York, Brooklyn, N.Y., 29 FLRA 94 (1987) (Eastern District) (Provision 1), in which the Authority found that a provision requiring that disciplinary action be taken within a reasonable period of time did not directly interfere with management's right to discipline. The Agency argues, however, that Eastern District concerned application of the harmful error rule and did not constitute a repudiation of the "principle that a contractual statute of limitations was nonnegotiable[.]" Statement at 9.

The Agency argues that the Authority's rationale in Food and Nutrition Service "flies in the face of reality." *Id.* at 7. According to the Agency, the only reason for an employee in a grievance challenging

discipline to assert the "procedural defense of untimeliness" is to demonstrate that he or she should not be disciplined because of the untimeliness. *Id.* at 8. The Agency also argues that Food and Nutrition Service is inconsistent with Antilles and Merchant Marine Academy. The Agency states that the only difference between the Antilles and Merchant Marine Academy cases and the Food and Nutrition Service case is that, in Antilles and Merchant Marine Academy, the proposals themselves specified the limitations on management and, under Food and Nutrition Service, an arbitrator would be allowed to specify the limitations. The Agency maintains that this "is a distinction without significance" and contends that the effect of the provision in dispute "remains as a direct interference with management's right to discipline by creating contractual time limits enforceable via arbitration." *Id.* at 11.

B. Union

The Union argues, citing Immigration and Naturalization Service and American Federation of Government Employees, Local 505, 22 FLRA 643 (1986) (INS) and United States Customs Service and National Treasury Employees Union, 22 FLRA 607 (1986), that "an arbitrator can reverse or mitigate a disciplinary action because of management's dilatoriness." Response at 4. The Union states that in INS the Authority held that an arbitrator could find that an agency's delay in initiating disciplinary action "does not actually promote the efficiency of the service." *Id.* at 5. The Union claims that the Agency "makes no effort to show that it may, in accordance with 5 U.S.C. Chapter 75, proceed dilatorily and effect untimely disciplinary actions." *Id.*

The Union states that "[a]s the [A]gency concedes, the Authority has found that proposals essentially identical to the [provision] in dispute here do not affect the authority of management officials to take disciplinary actions within the meaning of 5 U.S.C. § 7106(a)(2)(A)." *Id.* Citing Food and Nutrition Service and Eastern District, the Union asserts that the Agency "makes no persuasive case for abandoning these precedents." *Id.*

The Union claims that the provision "is obviously a procedure which management officials would observe in exercising their right to discipline" under section 7106(a)(2)(A) of the Statute. *Id.* The Union claims that, "[b]y the plain terms of [section] 7106(b)(2)," proposals that establish procedures governing the exercise of management's rights under section 7106(a) are negotiable. *Id.* at 6. The Union also asserts that "[a]bsent a showing that the [provision] is procedural in form only," the provision cannot be found to be nonnegotiable under section 7106(a)(2)(A). *Id.*

(footnote omitted). The Union contends, in this connection, that the Agency has not "identifi[ed] a single hypothetical situation in which compliance with the [provision] would be tantamount to rendering meaningless [the Agency's] authority, in accordance with applicable law, to take disciplinary action." *Id.* The Union states that the provision is intended to "reduce the number of stale, untimely disciplinary actions management successfully takes." *Id.* at 5-6.

IV. Analysis and Conclusions

For the following reasons, we find that the provision is negotiable as a procedure under section 7106(b)(2) of the Statute.

A. The Meaning of the Provision

The provision prescribes the steps that management will take after it notifies an employee that the employee is subject to discipline. Once an employee has had an opportunity to respond to disciplinary charges, the provision requires the Agency to timely decide that discipline is warranted and to expeditiously recommend an appropriate penalty. The provision does not prescribe the consequences that would result from management's failure to timely decide that discipline is warranted or to expeditiously recommend an appropriate penalty. Rather, the proposal simply establishes a standard of timeliness governing the Agency's completion of the steps of the disciplinary process.

B. The Provision Does Not Directly Interfere with Management's Right to Discipline Employees under Section 7106(a)(2)(A) of the Statute.

In Merchant Marine Academy, we found that Provision 4, which required that a written decision be provided to an employee subject to disciplinary charges within 45 days after receipt of the employee's response to the notice of proposed discipline, was negotiable. Specifically, we found that the provision was incorrectly characterized as a "statute of limitations" on disciplinary action. We noted that the Authority had held proposed contractual time limits on disciplinary actions to be nonnegotiable "where failure to meet those limits would result in an agency's inability to take any action at all with respect to a potential disciplinary matter." Merchant Marine Academy, 39 FLRA at 203.

We found that Provision 4 in Merchant Marine Academy did not state that the untimely delivery of the written decision would bar the imposition of disciplinary action. We also found that Provision 4 was distinguishable from Provisions 3 and 8, which were found to be nonnegotiable, because expiration of the time limits in Provisions 3 and 8

barred disciplinary action based on the incident involved, while the time limit in Provision 4 did not bar disciplinary action. We found that Provision 4 did not directly interfere with management's right to discipline employees under section 7106(a)(2)(A) of the Statute and concluded, therefore, that Provision 4 was a negotiable procedure under section 7106(b)(2) of the Statute.

Nothing in the provision at issue in this case provides that the proposed disciplinary action will be barred if management fails to comply with the timeliness standards prescribed in the provision. The Union states that the provision is intended to reduce the number of "stale, untimely" disciplinary actions. Response at 5. This statement is consistent with the wording of the provision. Based on the Union's statement, we reject the Agency's argument that the only reason for grievants to assert the untimeliness of the Agency's action is to demonstrate that they should not be disciplined. Rather, we find that the provision ensures that, once the employee has responded to a proposed disciplinary action, processing of the discipline will be completed while the relevant evidence is fresh and available.

Consequently, we find that, under the provision in this case, as with Provision 4 in Merchant Marine Academy, failure to meet the prescribed time limit does not prevent the Agency from acting on the underlying disciplinary matter. Accordingly, we find, consistent with Provision 4 in Merchant Marine Academy, that the provision does not directly interfere with management's right to discipline employees under section 7106(a)(2)(A) of the Statute. We conclude, therefore, that the provision is a negotiable procedure under section 7106(b)(2) of the Statute. See also Food and Nutrition Service, 42 FLRA at 989; Eastern District, 29 FLRA at 96.

We reject the Agency's contention that our holdings in Food and Nutrition Service and Eastern District are inconsistent with our holdings as to Provisions 3 and 8 in Merchant Marine Academy and the proposal in Antilles. Provisions 3 and 8 in Merchant Marine Academy and the proposal in Antilles established contractual statutes of limitation that prevented management from disciplining employees after the prescribed time limits had expired. The provisions in Food and Nutrition Service and Eastern District established contractual standards for judging the timeliness of an agency's disciplinary actions that did not prevent the agency from taking disciplinary action. As we made clear in our disposition of Provision 4 in Merchant Marine Academy, proposals that would bar an underlying disciplinary action upon the expiration of specified time limits are nonnegotiable; proposals that establish timeliness standards governing completion of the various stages of the disciplinary

process, but do not preclude management from imposing discipline, are negotiable as procedures under section 7106(b)(2) of the Statute. Nothing in the Agency's argument has persuaded us to abandon that distinction. Consequently, we conclude that our decisions in Food and Nutrition Service and Eastern District are consistent with our holdings as to Provisions 3 and 8 in Merchant Marine Academy and in Antilles.

* * *

Accordingly, we conclude that the provision is negotiable as a procedure under section 7106(b)(2) of the Statute.

V. Order

The Agency shall rescind its disapproval of the provision.⁵

In NFFE, Local 29 and Corps of Engineers, Kansas City, 21 FLRA 233 (1986), the Authority found a proposal that provided an employee the right to remain silent during a Report of Survey investigation was not negotiable because it interfered with the right to discipline employees.

See also, Tidewater Virginia Federal Employees Metal Trades Council and Navy Public Works Center, Norfolk, Virginia, 15 FLRA 343 (1984). In the Tidewater case, the Authority, in agreement with the 1982 decision of the 9th Circuit Court of Appeals in Navy Public Works Center, Honolulu, Hawaii, found that a proposed contract provision concerning an employee's right to remain silent during any discussion with management in which the employee believed disciplinary action may be taken against him or her was outside the duty to bargain, as the provision prevented management from acting at all with regard to its substantive rights under section 7106(a)(2)(A) and (B) of the Statute to take disciplinary action against employees and to direct employees and assign work by having employees account for their conduct and work performance.

Union proposals to limit the type and age of evidence used to support disciplinary action have been found to violate management's right to discipline employees. See, AFGE and Naval Air Warfare Center, Patuxent River, Maryland, 47 FLRA 311 (1993)(proposal to limit use of supervisor's personal notes); NAGE and DVA Medical Center, Brockton and West Roxbury, Massachusetts, 41 FLRA 529 (1991)(proposal to limit use of supervisor's notes relating to performance evaluation); and, AFGE, Local 3732 and DOT, U.S. Merchant Marine Academy, Kings Point, New York, 39 FLRA 187 (1991)(proposal to prevent use of supervisor's notes older than 18 months).

⁵ In finding the provision to be negotiable, we make no judgment as to its merits.

Proposals which require progressive discipline have been held to interfere with management's right to remove or take other disciplinary action as they restrict the agency's right to choose a specific penalty. NTEU and Customs Service, Washington, D.C., 46 FLRA 696, 767-769 (1992); Merchant Marine Academy, 39 FLRA 187.

(e) To layoff or retain.

In NAGE, Local R1-144 and Naval Underwater Systems Center, 29 FLRA 471 (1987) the Authority defined the term layoff while discussing a proposal that would require the agency to place employees on administrative leave rather than furlough during brief periods of curtailed agency operations. "[W]hile the term 'to lay off' is not defined in the statute it generally involves the placing employees in a temporary status without duties for nondisciplinary reasons." (p. 477). The Authority went on to hold that the proposal was negotiable since employees could be laid off in a paid or nonpaid status and therefore, the proposal did not interfere with management's right to lay off employees.

Proposals designed to minimize the impacts of RIFs on bargaining unit employees are frequently challenged as an interference with management's right to layoff. In Federal Union of Scientists and Engineers, NAGE Local R1-144 and Naval Underwater Systems Center, 25 FLRA 964 (1987) a proposal which required termination of all temporary, part-time and other similar categories of employees before taking RIF action against full-time employees was found to be nonnegotiable.

3. To Assign Work, To Make Determinations With Respect To Contracting Out, and To Determine the Personnel By Which Agency Operations Shall Be Conducted.

(a) To Assign Work. This refers to the assignment of work tasks or functions to employees. The right to assign duties to positions or employees has also been construed broadly by the Authority. Proposals aimed at placing limitations on the right to assign work have consistently been found nonnegotiable. Although management has broad authority to assign work, it can be required to bargain on proposals that would require the updating of position descriptions so that they accurately reflect the duties assigned.

In Georgia National Guard, 2 FLRA 580 (1979), the Authority held that a proposal prohibiting the assignment of grounds maintenance or other non-job related duties to technicians and preventing management from assigning such work, regardless of whether reflected in position descriptions, without employee consent, violated section

7106(a)(2)(B). FLRA distinguished this proposal from that in dispute in the Fort Dix case (*infra*) by noting that the proposal in Fort Dix, while it required management to amend position descriptions, did not prevent management from assigning additional duties. The first paragraph of the Georgia National Guard proposal, on the other hand, prevented the agency from assigning certain duties to technicians even if their position descriptions include, or were amended to include, such duties.

**AFGE, Local 199 and
Army - Air Force Exchange Service, Fort Dix, New Jersey**

2 FLRA 16 (1979)

(Extract)

* * *

Union Proposal II

Article 13, Section 2

The phrase "other related duties as assigned," as used in job descriptions, means duties related to the basic job. This phrase will not be used to regularly assign work to an employee which is not reasonably related to his basic job description. [Only the underlined portion is in dispute.]

Question Here Before the Authority

The question is whether the union's proposal would violate section 7106(a)(2)(B) of the Statute.

Opinion

Conclusion: The subject proposal does not conflict with section 7106(a)(2)(B) of the Statute. Accordingly, pursuant to section 2424.8 of the Authority's Rules and Regulations (44 Fed. Reg. 44740 *et seq.* (1979)), the agency's allegation that the disputed proposal is not within the duty to bargain, is set aside.

Reason. The union's proposal would prevent the agency from using the term "other related duties as assigned" in an employee's position description to assign the employee, on a regular basis, duties which are not reasonably related to his or her position description. The agency alleges that this proposal would affect its authority to assign work in violation of the Statute. However, it would appear, both from the

language of the proposal and the union's intent as stated in the record, that the agency has misunderstood the effect of the proposal. That is, the plain language of the union's proposal concerns agency management's use of employee position descriptions in connection with the assignment of work, not, as the agency argues, the assignment of work itself.

Under Federal personnel regulations, a position description is a written statement of the duties and responsibilities assigned to a position.

It is the official record of, among other things, the work that is to be performed by the incumbent of the position, the level of supervision required, and the qualifications needed to perform the work. From the standpoint of the employee, the position description defines the kinds and the range of duties he or she may expect to perform during the time he or she remains in the position. In the actual job situation, however, an employee might never be assigned the full range of work comprised within the position description. That is, the position description merely describes work which it is expected would be assigned, but is not itself an assignment of work.

In addition, the position description is the basis of the classification and pay systems for Federal employees. The validity of the classification of employee's position, and, derivatively, of an employee's rate of pay, is thus dependent on the accuracy of an employee's position description. Changes in the kinds and the level of responsibility of the duties assigned an employee may necessitate changes in the position description and, correlative, depending on the circumstances, changes in the classification and the rate of pay of the position.

It is in this context that the intent of the union's proposal must be understood. Both the language of the proposal and the record in this case support the conclusion, briefly stated, that the subject proposal is designed to insure the accuracy of employee position descriptions. That is, the intended effect of the proposal is to prevent the agency from expanding the work regularly required of the incumbent of a position by assigning work which is not reasonably related to the duties spelled out in the position description under the guise of the general phrase "other related duties as assigned." This does not mean, however, that the proposal would foreclose the agency from adding such unrelated duties to a position. Nothing in the language of the proposal or the record indicates that it is intended to shield the employee from being assigned additional "unrelated" duties, *i.e.* duties which are not within those described in his or her existing position description in order to do so. The proposal would in no way preclude the agency from including additional, though related, duties in the position description. Thus, in the circumstances of this case, the right of the agency to assign work remains unaffected, while the

employee is assured that his or her position description accurately reflects the work assigned to the position.

As indicated at the outset, therefore, the agency has misunderstood the intended effect of the union's proposal. The subject matter of that proposal is not the assignment of work, as alleged by the agency, but the application of the phrase "other related duties as assigned" when used in a position description. The agency has failed to support its allegation that such a proposal is nonnegotiable under section 7106. Accordingly, the agency's allegation is hereby set aside.

* * *

Although proposals concerning work assignment are nonnegotiable, proposals dealing with overtime are often negotiable. Management must be prepared to negotiate who will be assigned overtime but need not negotiate how much overtime is to be assigned or if it is necessary at all. See AFGE and Dep't of Agriculture, 22 FLRA 496 (1986); NFFE and VA, 27 FLRA 239 (1987); Nat'l Assoc. of Agriculture Employees and Dep't of Agriculture Animal and Plant Health Inspection Service, Elizabeth, N.J., 49 FLRA 319 (1994).

The right to assign duties was elaborated upon in the Denver Mint case, 3 FLRA 42 (1980), where the Authority, in addition to finding that a requirement that management rotate employees among positions violated Section 7106(a)(2)(A); also found that a requirement that an employee be rotated through the duties of his position on a weekly basis violated Section 7106(a)(2)(B).

[E]ven if the union intended only that employees be rotated to the various duties within their own position description, the specific language of the proposal at issue would require all employees to be rotated each week regardless whether any work were available which required the performance of such duties or whether the work previously assigned had been completed. In other words, the manager would be restricted to making new assignments, or in modifying, terminating, or continuing existing ones as deemed necessary or desirable. Accordingly, the specific proposal at issue herein is outside the duty to bargain under the Statute. [Emphasis added.]

Proposals which restrict an agency's right to determine the content of performance standards and critical elements directly interfere with management's rights to direct employees and assign work under section 7106(a)(2)(A) and (B). Patent Office Professional Assoc. and Patent and Trademark Office, Washington, D.C., 47 FLRA 10 (1993); Nat'l Assoc. of Agriculture Employees and Animal and Plant Health

Inspection Service, 49 FLRA 319 (1994). Proposals or Provisions that concern the assignment of specific duties to particular individuals also interfere with management's right to assign work. Patent and Trademark Office, 47 FLRA 10, 23 (1993).

For other cases involving management's right to assign work, see MTC and Navy, 38 FLRA 10 (1990); AFGE and Department of Labor, 26 FLRA 273 (1987); Intl Fed. of Prof. and Tech. Engineers and Norfolk Naval Shipyard, 49 FLRA 225 (1994)(a proposal to require removal of any employee who tests positive for illegal drugs from the chain of custody of drug testing specimens found to interfere with management's right to assign work).

(b) Contracting Out. The right of unions to bring action under the Administrative Procedure Act (APA) challenging the agency's contracting out decision was denied in AFGE v. Brown, 680 F.2d 722 (11th Cir. 1982), *cert. denied*, 103 U.S. 728 (1983); see also NFFE v. Cheney, 883 F.2d 1038 (D.C. Cir. 1989). However, the Sixth Circuit found that a contracting out decision was subject to judicial review under the APA. Diebold v. United States, 947 F.2d 787 (6th Cir. 1991), *petition for rehearing and rehearing en banc denied*, 961 F. 2d 97 (6th Cir. 1992).

The following case discusses the negotiability of proposals concerning contracting out.

**NFFE Local 1214 and
U.S. Army Training Center and Fort Jackson, Fort Jackson, South Carolina**

45 FLRA 1222 (1992)

(Extract)

I. Statement of the Case

This case is before the Authority on a negotiability appeal filed by the Union under section 7105(a)(2)(E) of the Federal Service Labor-Management Relations Statute (the Statute). The appeal concerns the negotiability of one proposal which provides that, when feasible, the Agency will contract out only when it would be economically efficient, effective to the Agency's mission, or in the best interests of the Government. For the following reasons, we find that the proposal is nonnegotiable.

II. Proposal

The Employer agrees that, when feasible, contracting out of its functions and/or missions should only occur when it is demonstrated that such contracting out would be economically efficient, effective to the mission, or in the best interest of the Federal Government.

III. Positions of the Parties

A. Agency

The Agency contends that the proposal directly and excessively interferes with its right under section 7106(a)(2)(B) to contract out. The Agency argues that the proposal does not merely require the Agency to comply with Office of Management and Budget (OMB) Circular A-76 but that the proposal "would remain in effect even if the OMB Circular is modified." Statement of Position at 3. According to the Agency, inclusion of the term "when feasible" does not render the proposal negotiable because, in the Agency's view, every contracting out decision "must comply with the proposal's requirement[s]...." *Id.*

The Agency also contends that the proposal is not intended as an arrangement "to lessen the adverse affects" of a decision to contract out. *Id.* at 4. According to the Agency, the proposal "negates management's right to contract out and does not concern any arrangements for employees affected by the implementation of that right." *Id.* Moreover, the Agency argues that the proposal excessively interferes with management's right to contract out because it would "completely prohibit[] the [Agency] from contracting out work unless i[t] can be shown that doing so meets the restrictions contained in the proposal." *Id.*

B. Union

The Union contends that the Agency's right to contract out is restricted by applicable law and regulation, including OMB Circular A-76, and that, based on the Authority's decision in National Treasury Employees Union and U.S. Department of the Treasury, Internal Revenue Service, 42 FLRA 377 (1991) (IRS), *petition for review filed sub nom. Department of the Treasury, Internal Revenue Service v. FLRA*, No. 91-1573 (D.C. Cir. Nov. 25, 1991), such law and regulation may be enforced through arbitration. The Union claims that as OMB Circular A-76 requires that "all contracting-out . . . must be in the public interest[,] . . . efforts of this nature cannot be in the public interest when contracting-out is not found to be economically efficient, effective, or in the best interest of the Federal Government." Petition for Review at 2. According to the

Union, "the proposal [does] not introduce or impose any limitation or restriction that is not already imposed upon the [A]gency through [applicable regulations]. . ." Reply Brief at 3.

Finally, the Union states that the proposal is "not intended to address the specific or adverse impact associated with contracting out decisions[.]" *Id.* at 4. Rather, the Union states that it "possesses a number of options that have been negotiated, and are presently under negotiation, that are designed to address specific or adverse impact, or redress adverse impact suffered by employees when management applies or executes its 7106 rights in a legal, extraordinary, or extralegal manner." *Id.*

IV. Analysis and Conclusions

Proposals that establish substantive criteria governing the exercise of a management right directly interfere with that right. See, for example, National Federation of Federal Employees, Local 2050 and Environmental Protection Agency, 36 FLRA 618, 625-27 (1990). However, insofar as management rights under section 7106(a) (2) are concerned, proposals that merely require compliance with applicable laws do not directly interfere with the exercise of such rights. IRS. The term "applicable laws" in section 7106(a) (2) includes, among other things, rules and regulations, including OMB Circular A-76, which have the force and effect of law. *Id.* Consequently, proposals merely requiring compliance with OMB Circular A-76 do not directly interfere with management's right to contract out. American Federation on Government Employees, AFL-CIO, Department of Education Council of AFGE Locals and Department of Education, 42 FLRA 1351, 1361-63 (1991) (Department of Education); AFSCME Local 3097 and Department of Justice, Justice Management Division, 42 FLRA 587 (1991), *petition for review filed sub nom. Department of Justice, Justice Management Division v. FLRA*, No. 91-1574 (D.C. Cir. Nov. 25, 1991).

In this case, the disputed proposal permits the Agency to contract out only if the Agency can demonstrate that such action "would be economically efficient, effective to the mission, or in the best interest of the Federal Government." In this regard, we reject the Union's contention that, based on IRS, the proposal does not directly interfere with the Agency's right to contract out because it merely implements OMB Circular A-76. Nothing in the wording of the disputed proposal refers to or cites OMB Circular A-76 and we have no basis on which to conclude that the proposal constitutes a restatement of any provisions in the Circular. Compare Department of Education, 42 FLRA at 1361-63 (a proposal which obligated the agency to conform to a particular requirement of OMB

Circular A-76 found not to directly interfere with the agency's right to contract out in circumstances where the proposal merely restated the requirement of the Circular and where the union stated that the proposal would no longer have any effect if the Circular were modified to remove the requirement in question). We find the Union's explanation of the proposal inconsistent with its plain wording and, as a result, we do not adopt the Union's explanation. See, for example, National Association of Government Employees, Federal Union of Scientists and Engineers, Local R1-144 and U.S. Department of the Navy, Naval Underwater System Center, Newport, Rhode Island, 42 FLRA 730, 734 (1991).

We conclude that, by incorporating the standards of economic efficiency, mission effectiveness, and the best interests of the Government, the disputed proposal establishes substantive criteria governing the exercise of the Agency's right to contract out. Therefore, the proposal directly interferes with the Agency's right to contract out under section 7106(a)(2)(B) of the Statute. In reaching this conclusion we reject the Union's contention that inclusion of the phrase "when feasible" renders the proposal negotiable. The inclusion of such wording does not change the fact that management's discretion to contract out is restricted.

For example, International Federation of Professional and Technical Engineers, Local 4 and Department of the Navy, Portsmouth Naval Shipyard, Portsmouth, New Hampshire, 35 FLRA 31, 37-38 (1990).

Finally, it is clear that the disputed proposal is not intended to be an appropriate arrangement under section 7106(b) (3) of the Statute. In this regard, the Union expressly states that its proposal is "not intended to address the specific or adverse impact associated with contracting out decisions[.]" Reply Brief at 4. According to the Union, it "possesses a number of options that have been negotiated, and are presently under negotiation, that are designed to address specific or adverse impact, or redress adverse impact suffered by employees when management applies or executes its 7106 rights in a legal, extraordinary, or extralegal manner." *Id.*

As the disputed proposal directly interferes with the Agency's right to contract out under section 7106(a)(2)(B) of the Statute, it is nonnegotiable. Accordingly, we will dismiss the Union's petition.

V. Order

The Union's petition for review is dismissed.

The Supreme Court was involved in resolving some of the issues relating to contracting out. The Court granted cert. in IRS v. FLRA, 862 F.2d 880 (D.C. Cir. 1989).

The issue in this case concerned the union's ability to negotiate or grieve management's decision to contract out federal work. The proposal submitted by the union would have established the grievance and arbitration provision of the union's master labor agreement as the union's internal administrative appeal for disputed contracting out cases. The Court held the proposal was not negotiable. It stated that a union cannot try to enforce a rule or regulation through negotiated grievance procedures if the attempt affects the exercise of a management right unless the rule or regulation is "an applicable law." The Court remanded the case back to the D.C. Circuit. IRS v. FLRA, 110 S. Ct. 1623 (1990). The D.C. Circuit promptly remanded the case back to the FLRA, stating that the determination of whether Circular A-76 is an "applicable law" must be performed in the first instance by the FLRA. IRS v. FLRA, 901 F.2d 1130 (D.C. Cir. 1990).

On remand, the FLRA ruled that Circular A-76 is an "applicable law" and hence unions can challenge contracting out decisions through arbitration. NTEU and IRS, 42 FLRA 377 (1991). On review, the D.C. Circuit initially found that OMB Circular A-76 was an "applicable law" within the meaning of § 7106 and also found that the proposal was negotiable. IRS v. FLRA, 901 F.2d 1130 (D.C. Cir. 1990). As with the 4th Circuit case, this opinion was short lived. The court, meeting en banc, reversed its position and held that the provision was not negotiable. The court found that it was unnecessary to decide whether the Circular was an "applicable law" in order to determine whether it was negotiable. The court found the Circular to be a government wide regulation under § 7117(a) that specifically excluded the use of grievance and arbitration procedures. The court held,

We hold that if a government-wide regulation under section 7117(a) is itself the only basis for a union grievance--that is, if there is no pre-existing legal right upon which the grievance can be based--and the regulation precludes bargaining over its implementation or prohibits grievances concerning alleged violations, the Authority may not require a government agency to bargain over grievance procedures directed at implementation of the regulation. When the government promulgates such a regulation, it will not be hoisted on its own petard.

IRS v. FLRA, 996 F.2d 880 (D.C. Cir. 1993).

(c) Personnel by which operations are accomplished. In Marine Corps Development and Education Command, 2 FLRA 422 (1980), the union proposed union representatives be made members of wage survey teams collecting data to be used in determining the wages of Nonappropriated Fund (NAF)

administrative support and patron service employees. Although the agency had extended the right to participate on wage survey teams to unions representing crafts and trades employees, the right to participate on wage survey teams gathering wage data to be used in determining the pay of administrative support and patron service employees was not similarly extended. The agency argued that the union's proposal interfered with management's right, under Section 7106(a)(2)(B), to determine the personnel by which its operations were conducted; that is, the agency was contending that the wage survey team constituted an operation of the agency. The Authority disagreed.

[I]rrespective of whether the use of such wage survey teams constitute a part of the operation of the agency or is a procedure by which the pay determination operation is carried out, nothing in the disputed provision would interfere with the agency's right to determine the personnel who will represent the agency's interests on such wage survey teams. The union's proposal merely provides that there will be union representation on such already established wage survey teams. [Emphasis in original.]

The Authority added that the disputed provision was consistent with the public policy, as expressed in 5 U.S.C. § 53(c)(2), of providing for unions a direct role in the determination of pay for certain hourly-paid employees.

4. With respect to filling positions, to make selections for appointments from--(i) among properly ranked and certified candidates for promotions; or (ii) any other appropriate source--Section 7106(a)(2)(C).

In VA, Perry Point, 2 FLRA 427 (1980), the union proposal in dispute read as follows:

It is agreed that an employer will utilize, to the maximum extent possible the skills and talents of its employees. Therefore, consideration will be given in filling vacant positions to employees within the bargaining unit. Management will not solicit applications from outside the minimum area of consideration or call for a Civil Service Register of candidates if three or more highly qualified candidates can be identified within the minimum area of consideration. This will not prevent applicants from other VA field units applying provided they specifically apply for the vacancy being filled, and that they are ranked and rated with the same merit promotion panel as local employees.

The Authority concluded that the proposal, despite express language to the contrary, would not prevent management from expanding the area of consideration once the minimum area was "considered and exhausted as the source of a sufficient number of highly qualified candidates."

In Navy Exchange, Orlando, 3 FLRA 391 (1980), the Authority was faced with another proposal seeking to restrict management's ability to consider outside applicants. The disputed proposal provided that management could consider outside applicants only when less than three minimally qualified internal applicants were being considered. It also provided that management could engage in external recruitment only when it was determined that none of the internal applicants were qualified.

The agency argued that the proposal would negate management's right, under 5 U.S.C. § 7106(a)(2)(C), to select from among properly ranked and certified candidates for promotion or from any other appropriate source. The agency also argued that the proposal would require the promotion of an internal unit employee if three minimally qualified employees were available. This interpretation was adopted by the Authority for the purpose of its decision. The FLRA held that the proposal violated section 7106(a)(2)(C).

The proposal here involved, which would restrict management's right to consider properly ranked and certified candidates for promotion or outside applicants . . . would infringe upon the right to select.

The Authority distinguished this case from Perry Point by noting that the Perry Point proposal, in requiring only that consideration be given to unit employees, did not prevent management from exercising its reserved right to select. The Authority added that, to the extent the proposal required selection of unit employees if there were three minimally qualified employees it, like the CSA case, would conflict with 5 U.S.C. § 7106(a)(2)(C).

A union proposal to include one union member on a three member promotion-rating panel for specific unit vacancies was held non-negotiable in AFGE, Mint Council 157 and Bureau of the Mint, 19 FLRA 640 (1985). The FLRA reasoned that the provision would interject the union into the determination of which employees would be selected for promotion, thus interfering with management's right to select under section 7106(a)(2)(c).

In ACT New York State Council and State of New York, Division of Military and Naval Affairs, 45 FLRA 17 (1992), the FLRA found that a union proposal which "substantively limits the Agency's right to determine the extent to which experience as a part-time military member of the National Guard satisfies qualification requirements for civilian position" was not negotiable. *Id.* at 20.

5. Right to take actions necessary to carrying out agency mission during emergencies--section 7106(a)(2)(D).

**ASSOCIATION OF CIVILIAN TECHNICIANS
and
PENNSYLVANIA NATIONAL GUARD
7 FLRA 346 (1981)**

(Summary of the Case)

The disputed provision said that management retained the right "to take whatever actions may be necessary to carry out the mission of the agency during emergencies, when verified and declared by the Activity Supervisor." (Only the underlined language was disputed.) The intent of the provision, according to the union, was to make clear who would be telling employees that an emergency situation existed. This explanation was rejected by the Authority on the ground that the language was clear and unambiguous and, as such, came into conflict with 5 U.S.C. § 7106(a)(D).

The provision here in dispute, on its face, would directly interfere with [management's] statutory right by requiring that a particular management official must first verify and declare that an "emergency" exists before management could act pursuant to section 7106(a)(2)(D).

FLRA added that were a proposal explicitly drafted to conform with the stated intent of the union, it would constitute a negotiable procedure.

This is the first case in which the Authority has found a proposal nonnegotiable on the ground that it interfered with management's rights under section 7106(a)(2)(D). Although its decision throws no light on the question of what constitutes an emergency, it does make clear that any proposal that requires a particular agency official to first ascertain and announce that an emergency exists before management can take necessary action, violates management's rights under 5 U.S.C. § 7106(a)(2)(D). As the agency argued, given the union's provision, management officials would be unable to respond to an emergency if the designated official was not available or for any reason did not verify or declare an emergency.

NOTE: The Authority has narrowly construed the parameters of what constitutes an emergency. In NTEU Chapter 22 and IRS, 29 FLRA 348 (1987) the Authority held that not all proposals which relate to agency actions to carry out the agency mission during emergencies are nonnegotiable under section 7106(a)(2)(D). The agency must show how the proposals in question will, "either directly interfere with agency action or prevent the agency from taking the emergency action . . ." In Mac Dill Air Force Base,

Florida and NAGE Local 547, 43 FLRA 1565 (1992) the Authority held that Operation Desert Storm did not constitute an emergency.

The Authority has found proposals which attempt to define the term 'emergency' to be nonnegotiable. See, NFFE and National Guard Bureau, 49 FLRA 874 (1994) and cases cite therein.

d. Permissive/Optional Areas of Negotiation. Numbers, types, and grades of employees or positions assigned to any organizational subdivision, work project, or tour of duty, or on the technology, methods, and means of performing work.

This section is the successor to section 11(b) of E.O. 11491. Management may refuse to discuss a permissive subject of bargaining, or it may negotiate on such a matter at its discretion, § 7106(b)(1). Management may terminate negotiations on a permissive subject any time short of agreement, National Park Service, 24 FLRA 56 (1986). In this regard, certain excerpts from the floor debate in the House may be helpful:

Mr. Ford of Michigan . . . I might say that not only are they [Management] under no obligation to bargain [on a permissive subject], but in fact they can start bargaining and change their minds and decide they do not want to talk about it any more, and pull it off the table. It is completely within the control of the agency to begin discussing the matter or terminate the discussion at any point they wish without conclusion, and there is no appeal or reaction possible from the parties on the other side of the table.

It is completely, if you will, at the pleasure and the will of the agency.

....

Once agreement has been reached on a permissive subject, the agency head may not refuse to approve the agreement provision on the basis that there was no obligation to bargain on the subject, National Park Service, 24 FLRA 56 (1986);

Once an agreement is reached on a proposal that is both a prohibited topic of negotiation under § 7106(a) and a permissive topic under § 7106(b), the rules governing permissive topics will control and the proposal may not be declared non-negotiable. Assoc. of Civilian Technicians, Montana Air Chapter No. 29 v. FLRA, 22 F.3d 1150 (D.C. Cir., 1994) This case resolved a long standing dispute about the interaction between the two sections of 7106. The court said the clear language in § 7106(a) "Subject to subsection (b) of this section" established that § 7106(b) was an exception to the management rights provisions.

Activities renegotiating a collective bargaining agreement may attempt to eliminate provisions found in the earlier contract. The union may be reluctant to give up rights they have already obtained and will often assert that management may not declare those provisions which address permissive subjects nonnegotiable. The Federal Labor Relations Authority has stated that management is under no obligation to negotiate permissive subjects even if it has done so in earlier agreements. FAA, Los Angeles and PASS, Local 503, 15 FLRA 100 (1984).

On 1 October 1993, President Clinton issued an executive order directing the heads of each agency to, "negotiate over the subjects set forth in 5 U.S.C. § 7106(b)(1), and instruct subordinate officials to do the same . . ." The impact of the order on union management relations may be tempered by the following limitation that is also included in the order,

This order is intended only to improve the internal management of the executive branch and is not intended to, and does not, create any right to administrative or judicial review, or any other right, substantive or procedural, enforceable by a party against the United States, its agencies or instrumentalities, its officers or employees, or any other person.

Exec. Order No. 12,871, 58 Fed. Reg. 52201 (1993).

1. The Numbers, Types, and Grades of Employees or Positions Assigned to Any Organizational Subdivision, Work Project, or Tour of Duty (Staffing Patterns).

This permissive subject area involves the distribution and composition of the work force within the overall employee complement. Generally, if the proposal addresses the number of employees in an organizational subdivision, it falls within this section. Proposals that address the types or grades of employees within a subdivision are likewise not negotiable. The following case is helpful in understanding how proposals relating to the types , and grades of employees can arise during negotiations.

**OVERSEAS EDUCATION ASSOCIATION and
U.S. DEPARTMENT OF DEFENSE OFFICE OF DEPENDENTS
SCHOOLS
45 FLRA 1185 (1992)**

(Extract)

* * *

IV. Proposal 6

7.A. In the event a local hire employee meets the criteria of 1400.25m and the JTR Volume II (i.e., death, legal separation, divorce, etc.) an excepted appointment with condition shall be retroactively granted to the beginning of the school year.

Proposal 7

7.B. If a local hire employee is employed on or before November 1 of each year, he/she shall be retroactively given an excepted appointment with condition unless eligible for without condition.

A. Positions of the Parties

1. Agency

The Agency states that locally hired employees initially are hired on a temporary basis. The Agency asserts that their "temporary appointments have a 'not to exceed' date upon which the appointment expires, normally at the end of the school year." Statement at 13. The Agency further asserts that at the end of the temporary appointment, the Agency may: (1) terminate the temporary appointment; (2) reappoint the employee to another "temporary appointment not to exceed"; or (3) convert the employee to an excepted (permanent) appointment with condition providing that a continuing permanent position exists and the employee's performance is satisfactory. *Id.* at 13-14.

The Agency contends that Proposal 6 would "require management to convert (that is, appoint) locally hired temporary employees to permanent positions, and to make these appointments retroactive to the beginning [of] the school year." *Id.* at 14. The Agency asserts that the proposal would "dictate to the [A]gency the type of positions and/or employees (temporary v. permanent) necessary to accomplish its mission." *Id.* The Agency contends that proposals which concern the numbers, types and grades of positions and/or employees assigned to an organization are negotiable under section 7106(b)(1) of the Statute only at the election of the Agency. The Agency asserts that it has elected not to negotiate on Proposal 6 and, therefore, the proposal is nonnegotiable.

The Agency asserts that Proposal 7 is nonnegotiable for the same reasons as Proposal 6. Additionally, the Agency contends that Proposal 7 is contrary to Federal Personnel Manual (FPM) chapter 296, subchapter 1, which provides "that no personnel action can be made effective prior to the date on which the appointing officer approves the action." *Id.* at 15.

According to the Agency, FPM chapter 296, subchapter 2 outlines the exceptions to this requirement. The Agency contends that because Proposal 7 would require it to make "an appointment retroactive" absent the exceptions identified in the FPM, the proposal is inconsistent with the FPM chapter 296, subchapter 1, which is a Government-wide regulation. *Id.*

2. Union

In its petition, the Union asserted that Proposals 6 and 7 "would establish the process for determining when an appointment management has decided to make would become effective." Petition at 3. Subsequently, in its response, the Union explains that Proposals 6 and 7 "provide for additional times when an appointment to a temporary position may be converted to an Excepted Appointment-Conditional." Response at 8. According to the Union, DODD Number 1400.13 "covers when a fully qualified educator who has been appointed to a temporary position with [the Agency] will be converted to an Excepted Appointment-Conditional." *Id.* The Union states that "[c]onversion of fully qualified appointed employees under these regulations occurs as a result of specific triggering events and the passage of specified amounts of time." *Id.* at 8-9. The Union asserts that the proposals "provide for additional triggering events and periods of time for when conversion of a temporary appointment to an Excepted Appointment-Conditional would be permitted." *Id.* at 9. The Union contends that the appointment procedures for teachers are not "so specifically provided for" in 20 U.S.C. s 902 as to be excluded from the definition of conditions of employment under section 7103(a)(14)(C) of the Statute. *Id.*

B. Analysis and Conclusions

We find that Proposals 6 and 7 are nonnegotiable.

We note that Proposal 6 refers to "the criteria of 1400.25m and the JTR Volume II...." However, the record does not contain a copy of DODD Number 1400.25m or an appropriate reference to JTR Volume II. The Union provided only a copy of DODD Number 1400.13. Noting that DODD Number 1400.13 covers when a fully qualified educator who has been appointed to a temporary position will be converted to a permanent-conditional position, the Union explains that Proposals 6 and 7 provide for additional situations and time periods that would "trigger[]" the conversion of a temporary appointment to a permanent- conditional appointment. Union's Response at 9. The Agency asserts that the proposals require management to convert locally hired temporary employees to permanent positions, and to make these appointments retroactive to the beginning of

the school year. Locally hired employees are educators appointed in an overseas area. Based on the parties' positions and the wording of Proposals 6 and 7, it is our view that the proposals are intended to: (1) establish additional criteria requiring the conversion of locally hired employees on temporary appointments to permanent-conditional positions; and (2) make such appointments retroactive to the beginning of the school year.

Under section 7106(b)(1) of the Statute, an agency has the right to determine the numbers, types, and grades of employees or positions assigned to any organizational subdivision, work project, or tour of duty. In our view, determinations as to whether an employee holding a temporary appointment should be converted to or granted a permanent position in the Agency are matters directly related to the numbers, types and grades of employees or positions assigned to its organizational subdivisions, work projects, or tours of duty. See, for example, National Treasury Employees Union and Department of Health and Human Services, Region X, 25 FLRA 1041, 1051-52 (1987) (proposal requiring an agency, in certain circumstances, to convert full-time employees to part-time status found nonnegotiable because the determination as to use of part-time employees to perform the work of the agency is a matter directly related to the numbers, types, and grades of employees or positions assigned to an agency's organizational subdivisions, work projects, and tours of duty); National Federation of Federal Employees, Local 1650 and U.S. Forest Service, Angeles National Forest, 12 FLRA 611, 613 (1983) (proposal requiring an agency "to attempt to work all WAE employees for as many of non-guaranteed pay periods as available financing will allow" held nonnegotiable because it concerned the agency's right under section 7106(b)(1) of the Statute to determine the numbers, types, and grades of employees). See also American Federation of Government Employees, Local 1923 and U.S. Department of Health and Human Services, Health Care Financing Administration, Baltimore, Maryland, 44 FLRA 1405, 1457-58 (1992), *petition for review filed*, No. 92-1307 (D.C.Cir. July 24, 1992).

Under Proposals 6 and 7, if a temporary employee meets the specified criteria, management would be obligated to convert the employee's status from a temporary appointment to a permanent-conditional position, even if management decided that to do so would make its staffing patterns incompatible with its operational needs. The proposals would restrict management's decision as to the mix of specific types of employees, namely, temporary and permanent, that it will assign to various organizational subdivisions, in this case, local schools. Accordingly, we conclude that the proposals directly interfere with management's right to determine the numbers, types, and grades of

employees or positions assigned to an organizational subdivision under section 7106(b)(1) of the Statute. In view of this determination, we need not reach the Agency's contention that Proposal 7 conflicts with a Government-wide regulation.

We further note that the Union has not asserted that Proposals 6 and 7 constitute appropriate arrangements under section 7106(b)(3) of the Statute.

Accordingly, based on the above, we conclude that Proposals 6 and 7 are nonnegotiable.

V. Order

The petition for review is dismissed.

In determining whether a matter concerning changes in employees' hours of work is within the scope of section 7106(b)(1), the Authority previously made distinctions between: (1) changes in employees' hours of work which were integrally related to and consequently determinative of the numbers, types, and grades of employees or positions assigned to any organizational subdivision, work project, or tour of duty (see, for example, National Federation of Federal Employees, Local 1461 and Department of the Navy, U.S. Naval Observatory, 16 FLRA 995 (1984); U.S. Customs Service, Region V, New Orleans, Louisiana, 9 FLRA 116, 117 (1982)); and (2) changes which permit "a modicum of flexibility within the range of starting and quitting times for [an] existing tour of duty" National Treasury Employees Union, Chapter 66 and Internal Revenue Service, Kansas City Service Center, 1 FLRA 927, 930 (1979); see also U.S. Customs Service, Region V, 9 FLRA at 118-19. As to the former category of cases, the changes in employees' hours of work were found to be outside the duty to bargain; as to the latter category, the changes in hours were found to be within the duty to bargain. It has been noted that these distinctions are subtle ones. See, for example, Veterans Administration Medical Center, Leavenworth, Kansas, 32 FLRA 124, Judge's Decision at 842 (1988); National Treasury Employees Union v. FLRA, 732 F.2d 703 (9th Cir. 1984).

In AF Scott Air Force Base v. FLRA, 33 FLRA 532 (1988), the authority clarified the bargaining obligations with respect to changes in employees' hours of work. The authorities founded that the distinctions previously used are not supported by the relevant statutory and regulatory provisions.

An employee's daily tour of duty, stated the Authority, consists of the hours that the employee works; that is, from the time when the employee starts work until he or

she ends work. A decision as to what will constitute an employee's tour of duty is a decision by management as to when and where an employee's services can best be used. When an agency changes an employee's hours, that change, under applicable statutory and regulatory provisions, results in a new tour of duty for the employee. The degree of the change--whether it is a 1-hour change or an 8-hour change--does not alter the fact that the change results in a new tour of duty for the employee. A change in employees' starting and quitting times is a change in their tours of duty.

Changes in employees' tours of duty affect the "numbers, types, and grades of employee . . . assigned to . . . [a] tour of duty" within the meaning of section 7106(b)(1) of the Statute. To the extent that previous decisions of the Authority are to the contrary, they will no longer be followed.

Consistent with the statutory and regulatory provisions discussed above, agencies must generally give appropriate notice to employees of changes in their tours of duty. Further, the fact that an agency's decision to change employees' tours of duty is negotiable only at the agency's election should not be viewed as encouraging agencies not to bargain over these changes. Moreover, even where an agency exercises its right under section 7106(b)(1) not to bargain over the change itself, an agency has an obligation to bargain over the matters set forth in section 7106(b)(2) and (3) of the Statute: procedures to be observed by management in exercising its authority and appropriate arrangements for employees adversely affected by management's exercise of its authority.

In some instances, bargaining over flexible work schedules has been specifically authorized by statute. See, for example, American Federation of Government Employees, Local 1934 and Department of the Air Force, 3415 ABG, Lowry AFB, Colorado, 23 FLRA 872 (1986). Those instances are not affected by the decision in 33 FLRA 532 (1988).

(2) Technology, Methods and Means of Performing Work.

(a) Technology. Technology is the method of execution of the technical details of accomplishing a goal or standard.

(b) Methods and Means of Performing Work. These were previously prohibited subjects of bargaining under the Executive Order.

Method "The Authority has construed 'method' as referring to the way in which an agency performs its work." NTEU Chapter 83 and IRS, 35 FLRA 398, 406 (1990)..

Means "[I]n the context of section 7106(b)(1), [means] refers to any instrumentality, including an agent, tool, device, measure, plan, or policy

used by the agency for the accomplishing or the furthering of the performance of its work." NTEU and Customs Service, Region VIII, 2 FLRA 255, 258 (1979).

In Customs Region 8, 2 FLRA 254 (1979), the Authority agreed with the agency's contention that "the activity's requirement that uniformed employees wear nameplates while performing duties as customs officers is a decision as to the means of performing the agency's work." It further held that a proposal making the wearing of nameplates voluntary was not a bargainable appropriate arrangement because such an arrangement "would, in effect, empower employees to nullify the [nameplate] experiment."

The report of the House and Senate conferees states that while there might be circumstances when it would be desirable to negotiate on an issue in the methods and means area, it is not intended that agencies will discuss general policy questions determining how an agency does its work. The language must be construed in light of the paramount right of the public to an effective and efficient Government as possible. For example, the phrase "methods and means" is not intended to authorize IRS to negotiate with a labor organization over how [tax] returns should be selected for audit, or how thorough the audit of the returns should be.

The conferees went on to give other examples: EPA may not negotiate about how it would select recipients for environmental grants, nor may the Energy Department bargain over which of its research and development projects should receive top priority. OPM considers the intent of Congress to be that these examples are so closely related to agency "mission" as to be prohibited from bargaining.

In Oklahoma City Air Logistic Center, 8 FLRA 740 (1982), management committed a ULP by unilaterally changing existing conditions of employment regarding a policy on facial hair and respirator use without giving notice and opportunity to bargain to the union on the change. The Authority rejected management's contention that the change involved "technology, methods, and means of performing work" within the meaning of section 7106(b)(1). The issue was not about respirator use *per se*, but rather the effect of a change in facial hair policy on unit employees required to use the respirator. On a remand from the 9th Circuit, the Authority likewise found a union proposal on agency pay check distribution procedure to be a mandatory topic of bargaining, in spite of precedent holding it was a permissive matter because it involved a method or means of performing work. Mare Island Naval Shipyard, 25 FLRA 465 (1987).

Distinguishing between "mission" (prohibited) and "methods and means" (permissive) may be quite difficult in some cases. However, management should never consider negotiating whenever a permissive proposal involves basic policy choices with

respect to priorities and overall efficiency and effectiveness. "Methods and means" are removed from basic policy; they relate more to the techniques, procedures, plans, tools, etc., used to accomplish policy goals.

e. **Mid-Contract Bargaining/Unilateral Changes.**

1. Overview. The obligation to negotiate does not end when the collective bargaining agreement is signed. Whenever management is to make a change concerning a matter which falls within the scope of bargaining, the exclusive representative must be given notice of the proposed change and given an opportunity to negotiate if the change results in an impact on unit employees, or such impact was reasonably foreseeable. U.S. Government Printing Office, 13 FLRA 39 (1983).

If the matter is not addressed in the collective bargaining agreement, the union must be given reasonable notice of the proposed change and an opportunity to negotiate. If the union indicates it does not desire to negotiate the matter or fails to respond within a reasonable time, the decision may be implemented. If the union desires to negotiate the matter the parties must negotiate and reach agreement or initiate impasse procedures. See Scott AFB and NAGE, 5 FLRA 9 (1981).

In 1985 the Authority took the position that, "other than negotiations leading to a basic collective bargaining agreement, there is no obligation to bargain over union-initiated proposals." IRS, 17 FLRA 731, 736 (1985). On review, the D.C. Circuit refused to enforce this decision. The D.C. Circuit, relying heavily on private-sector precedent, held that to deny a union the right to initiate midterm bargaining, while an agency retained such a right, would violate the statutory goal of equalizing the positions of labor and management at the bargaining table. NTEU v. FLRA, 810 F.2d 295, 300-301 (D.C. Cir. 1987). On remand, the Authority held that Agencies must bargain on union-initiated midterm proposals concerning matters not addressed in the CBA unless the union has clearly and unmistakably waived its right to bargain about the particular matter. This waiver could be established either by express agreement or bargaining history. IRS, 29 FLRA 162, 166 (1987).

IRS established a two pronged test for determining whether midterm bargaining was required. If a union requested negotiations on an issue that was addressed in a collective bargaining agreement, the agreement would control as long as it was in effect. There was no duty to participate in mid-term bargaining on that issue. If the subject was not addressed in the contract, bargaining was required on negotiable issues if the union had not clearly and unmistakably waived its rights to bargain. In order to determine whether a union had waived its rights required inquiry into, "the wording of the provision, . . . other relevant provisions of the contract, bargaining history, and past practice." IRS at 166. The difficulty in this analysis lay in determining the level of similarity required between a contract provision and a proposal before the

proposal was deemed to be covered by the contract. The Authority initially determined that, "the determinative factor is whether the particular subject matter of the proposals . . . is the same." U.S. Army Corps of Engineers, Kansas City District, Kansas City, Missouri, 31 FLRA 1231, 1236 (1988). The D.C. Circuit soundly criticized this position in Marine Corps Logistics Base v. FLRA, 962 F.2d 48 (1992).

During the same time period, the 4th Circuit in Social Security Administration, 956 F.2d 1280 (1992) took a very different position on the same issue. A federal agency sought review of a FLRA order directing the agency to participate in mid-term collective bargaining. The Court of Appeals held that there was no obligation to engage in union-initiated midterm bargaining over matters that did not involve an agency's changes in conditions of employment.

The FLRA has clearly rejected the 4th Circuit's opinion, electing to continue adhering to their holding IRS. See, Michigan National Guard and AFGE, Local 2077, 46 FLRA 582 (1992); Social Security Administration and AFGE Council 220, 47 FLRA 1004 (1993). In response to the D.C. Circuit criticism, the Authority has established a new test for determining whether an otherwise bargainable matter is covered by an existing contract. The authority will now look to see if the express language of the agreement "reasonably encompasses" the subject matter of the proposals. This no longer requires that the language be the same but whether, "a reasonable reader would conclude that the provision settles the matter in dispute." Social Security Administration, 47 FLRA 1004, 1018 (1993). If the language does not expressly encompass the matter, the Authority will look to determine whether the subject is, "inseparably bound up with and . . . thus is plainly an aspect of . . . a subject expressly covered by the contract." Id. This analysis, "will examine whether, based on the circumstances of the case, parties reasonably should have contemplated that the agreement would foreclose further bargaining . . ." Id at 1019. While additional cases will be necessary in order to flesh out this "framework," it appears that the new approach will give greater strength to agency arguments that union mid-term proposals deal with matters already covered by existing contract provisions. See also Social Security Administration and AFGE Council 147, 47 FLRA 1067 (1993); Sacramento Air Logistics Center, McClellan Air Force Base and AFGE Local 1857, 47 FLRA 1225 (1993).

The 4th Circuit has reached a different conclusion. It held that the union simply does not have a right to initiate mid-term bargaining. SSA v. FLRA, 956 F.2d 1280 (4th Cir. 1992). The FLRA has indicated its intent to follow the D.C. Circuit's ruling.

2. Notice Requirements. Management has a duty to give adequate prior notice to the union of changes in conditions of employment. Failure to do so is, by itself, an unfair labor practice. In Newark Air Force Logistics Command, 4 FLRA 512 (1980), the FLRA ruled that even though the union had actual knowledge of a proposed change, that the activity did not give appropriate advance notice of the change to the

union, as a union. This was the result of the presence of a union steward as an employee, not as a union representative, at a meeting discussing a proposed change in working conditions. This ruling was overturned by the Sixth Circuit Court of Appeals. According to the court, the Authority's apparent attempt to prevent employers from running changes in working conditions past unions before they can act may be valid. But, the court stated that the FLRA should take this action via a policy statement or regulation, not through a case decision where the facts show that the employer provided adequate notice. The court further stated that . . . "labor statutes such as the one at issue here are designed, in part, to smooth labor-management relations by providing informal mechanisms to guide the operation of the workplace and the resolution of disputes. The Authority's decision appears to inject needless formality into that process." Air Force Logistics Command, Aerospace Guidance and Metrology Center, Newark, Ohio v. Federal Labor Relations Authority, 681 F.2d 466 (6th Cir. 1982).

Notice of proposed changes in conditions of employment must be "adequate." What constitutes "adequate" prior notice will vary depending on the nature of the proposed change. The probable impact of a major reorganization, for instance, is greater than the probable impact of a decision to schedule the downgrading of two positions after they are vacated. The former warrants earlier notice than the latter. One should distinguish between the notice given the union of a proposed change in working conditions and a notice given a bargaining unit at impasse of intent to implement management's last best offer. The latter notice must be adequate to give the union an opportunity to invoke the services of the Impasses Panel, should the union elect to do so. It takes little time for the union to do this. In the AFLC case, 5 FLRA 288 (1981), the Authority concluded that eight days' notice of intent to implement management's impasse position was sufficient.

It is customary for the parties to establish steward districts and for the union to designate those of its officials who are entitled to act as agents of the union in the established districts. Where a proposed change in conditions of employment is limited to employees in a particular steward district, it is reasonable, in absence of negotiated arrangements and established practices to the contrary, to notify the steward servicing the district.

There is no requirement that the notice be in writing. Many proposed changes are quite straight forward, limited in impact (although nonetheless meeting the "substantial" impact test), and need to be implemented with dispatch. Notice and bargaining, if any, can be accomplished by means of a telephone call or a meeting--either a meeting called for the purpose or at a regularly scheduled union-management meeting. The greater the degree of formality in day-to-day transactions with the union, the longer it takes to complete the notice/bargaining process. Whether the parties find such informal dealings acceptable depends, in part, on the character of the relationships. Where there is mutual trust and where oral understandings are treated

with the same deference as written agreements, the parties are apt to prefer informal dealings.

Once adequate notice is given to an appropriate union agent, the burden is on the union to request bargaining. See IRS, 2 FLRA 586 (1980). Union bargaining requests need not be accompanied by specific proposals. However, a general bargaining request should promptly be followed up with specific union proposals that directly relate to the proposed change. 5 FLRA 817 and 823 (1981).

3. Bargaining Impasses. Management can unilaterally implement its last best offer provided that it gives the union notice of its intent to implement and union does not timely invoke the services of the Impasses Panel. (See Air Force Logistics Command, 5 FLRA 288 (1981).) The Authority will review the conduct of the parties to determine whether both parties negotiated in good faith to impasse and whether the union's failure to seek assistance constituted a clear and unmistakable waiver. Compare Michigan National Guard, 46 FLRA 582 (1992) with Lowry Air Force Base and AFGE Local 1974, 22 FLRA 171 (1986). Although the Panel, in 5 C.F.R. § 2470.2(e), defines an impasse as "that point in the negotiation of conditions of employment at which the parties are unable to reach agreement, notwithstanding their efforts to do so by direct negotiations and by the use of mediation or other voluntary arrangements for settlement," one should not infer that mediation is necessary. In this connection, see DOT, Denver, 5 FLRA 817 (1981), where the ALJ found that the parties had bargained to impasse after a brief discussion. In that case no reference was made to mediation. Nor can one say how long the parties must bargain before a bona fide impasse is reached. This will vary, depending on the number and nature of the items being negotiated. In DOT, Denver, a discussion taking less than an hour was sufficient. In SSA, Birmingham, 5 FLRA 389 (1981), the ALJ found that the parties had not bargained to impasse because they had only one bargaining session and there was no other evidence in the record indicating that the parties had exhausted bargaining.

It is OPM's position that management, in the context of impact and implementation bargaining, has the right to implement after bargaining in good faith to a bona fide impasse, regardless of whether the services of the Impasses Panel are timely invoked, in order to comply with law or appropriate regulation and in order to exercise a retained management right in a timely fashion to meet mission requirements. For example, an agency may have determined it is necessary to relocate part or all of its work force geographically. If the parties impasse on impact and implementation matters, management should not be required to delay the moves pending Panel action, which could involve many months with its attendant costs. Such a position is bound to be controversial. In taking the position that management's rights include the right to implement without unreasonable delay when such delay can adversely affect mission accomplishment (as opposed to the delay of an individual disciplinary action), it must be emphasized that management has certain obligations. It has the duty to provide the

union with the adequate notice and to afford it sufficient time to bargain on procedures and appropriate arrangements.

If a unilateral decision is made (one in which the union is not given notice or an opportunity to negotiate), the union frequently files an unfair labor practice charge for failure to negotiate in good faith [§ 7116(a)(5)]. Philadelphia Naval Shipyard, 15 FLRA 26 (1984).

f. **Impact and Implementation Bargaining**. Although certain agency decisions are not subject to bargaining, they may have a substantial impact on bargaining unit employees. As such, procedures for implementing these agency actions and arrangements for employees adversely affected are bargainable, even if the decision to take a specific course of action is not.

"Subject to subsection (b) of this section, nothing in this chapter shall affect the authority of any management official of any agency . . . [to exercise the listed management rights]". (5 U.S.C. § 7106(a)).

Nothing in this section shall preclude any agency and any labor organization from negotiating--

- (2) *procedures which management officials of the agency will observe in exercising any authority under this section; or*
 - (3) *appropriate arrangements for employees adversely affected by the exercise of any authority under this section by such management officials. 5 U.S.C. § 7106(b)(2) and (3).*
-

The decisions themselves are not subject to bargaining because they involve the exercise of rights reserved to management by 5 U.S.C. § 7106. Moreover, the impact and implementation, or procedures and arrangements bargaining obligation arises only as the result of a management initiative--i.e., of a proposed action that has a substantial impact on the conditions of employment of bargaining unit employees. The difficulty arises because the distinction between procedure and substance is not always clear.

In Department of Health and Human Services, SSA, Chicago, 19 FLRA 827 (1985), the FLRA reiterated the rule that no duty to bargain arises from the exercise of a management right that results in an impact or a reasonably foreseeable impact on bargaining unit employees which is no more than de minimus. To aid in determining whether exercise of a right has only a de minimus impact several factors must be considered:

. . . . the nature of the change (e.g., the extent of the change in work duties, location, office space, hours, loss of benefits or wages and the like); the temporary, recurring or permanent nature of the change (i.e., duration and frequency of the change affecting unit employees); the number of employees affected or foreseeably affected by the change; the size of the bargaining unit; and the extent to which the parties may have established through negotiation or past practice procedures and appropriate arrangements concerning analogous changes in the past, . . .

The Authority modified the de minimus test in HHS, Northeastern Program Service Center, 24 FLRA 403 (1986). In that case it held that the primary emphasis in applying the test would be placed on the nature and extent, or reasonably foreseeable effect, of the change on employees' conditions of employment. Further, the FLRA stated that it now considers the size of the bargaining unit irrelevant, and that it would consider the number of employees affected and the bargaining history only with a view toward expanding, not limiting, the number of situations in which bargaining would be required.

1. Procedures to be observed by management in exercising its retained right
-- Section 7106(b)(2). Limitations on Management Rights.

The "Implementation" area of negotiation -- Proposals Concerning "Procedures." Union proposals concerning the procedures which management officials will observe in exercising their management rights under § 7106(a) are negotiable. 5 U.S.C. § 7106(b)(2); DOD v. FLRA, 659 F.2d 1140 (D.C. Cir. 1981) (proposal that no removals will be effected until all grievances completed was negotiable); AFGE and AAFES, 2 FLRA 153 (1979)(union proposal that no employee be removed or suspended before completion of review was negotiable).

The problem lies in determining which proposals deal with procedures affecting the exercise of a management right and which are substantive infringements on the management right.

Where the proposals are "purely procedural" the Authority applies the "Acting at All" test. Department of Interior v. FLRA, 873 F.2d 1505 (D.C. Cir. 1989)(proposal to delay suspensions for 10 days). AFGE and Department of Education, 36 FLRA 130 (1990) (proposal to delay adverse action until all appeals have been exhausted). The issue is: Does the proposal prevent management from acting at all?

In those cases where the proposal is not as clearly procedural in nature, the Authority applies the "Direct Interference" test. Aberdeen Proving Ground v. FLRA, 890 F.2d 467 (D.C. Cir. 1989) (union proposal concerning procedure for establishing

legitimate use in drug testing found to be a negotiable procedure). The issue is: Does the proposal directly interfere with the agency's exercise of a management right?

History. This exception to management rights was found in the Executive Orders leading up to the Civil Service Reform Act. Although management, under E.O. 11491, retained its decision making and action authority respecting certain rights, it nonetheless had to bargain on procedures it would follow in exercising its rights. There was, however, an important caveat; the procedures could not be such as to "have the effect of negating the authority reserved." (See VA Research Hospital, 1 FLRC 227, 230, where the Council held that a proposed promotion procedure was negotiable because it did not "appear that the procedure proposed would unreasonably delay or impede promotion selections." The "unreasonable delay" standard was forcefully restated in the Elaine Air Force Station case, 3 FLRC 75, 79, where the Council said that a right reserved to management "includes the right . . . to accomplish such personnel actions promptly, or stated otherwise, without unreasonable delay." [Emphasis in original.]

The Order's "unreasonable delay" standard was challenged in the IRS, New Orleans case, 1 FLRA 896 (1979)--the second negotiability decision issued under the Statute. In that case a provision outlining a procedure management would follow in deciding whether to permit revenue officers to work from their homes was disapproved by the agency on the ground it came into conflict with section 7106(a). The Authority, relying upon a joint explanatory statement of the House-Senate Conference Committee, concluded that "procedures" were fully bargainable except where they prevented management from "acting at all." Finding nothing in the disputed provision preventing management from "acting at all," the Authority set aside the agency's allegation.

The following case discusses the issues that arise under the current statute.

**AFGE, COUNCIL OF PRISON LOCALS, LOCAL 3974 and
FEDERAL BUREAU OF PRISONS, MCKEAN, PENNSYLVANIA**

48 F.L.R.A. 225; (1993)

(Extract)

I. Statement of the Case

This case is before the Authority on a negotiability appeal filed under section 7105(a)(2)(E) of the Federal Service Labor-Management Relations Statute (the Statute). The appeal concerns the negotiability of a proposal that requires the Agency to give employees preference in filling vacancies before hiring from any other source. We find that the proposal is nonnegotiable because it directly interferes with management's right

under section 7106(a)(2)(C) of the Statute to make selections for appointments and it does not constitute an arrangement within the meaning of section 7106(b)(3).

* * *

III. The Proposal

In order to enhance career advancement opportunities for Federal Bureau of Prisons employees, the parties agree that current employees will be given first consideration for all vacancies. In addition to being first consideration [sic] the parties agree that where all qualifications are relatively equal the Federal Bureau of Prisons employee will be given preference before hiring from any other source.

IV. Positions of the Parties

The Agency contends that this proposal directly interferes with its management right to make selections from any appropriate source under section 7106(a)(2)(C)(ii) of the Statute. The Agency argues that the proposal would require consideration of Bureau of Prisons employees before outside applicants could be considered for vacancies at the Federal Correctional Institution, McKean, Pennsylvania. According to the Agency, under the proposal it could select an outside candidate only when the qualifications of that candidate were more than "relatively equal" to any Bureau of Prisons applicant. The Agency asserts that under Authority precedent, proposals that prevent an agency from giving concurrent consideration to outside applicants directly interfere with management's right to select from any appropriate source.

The Agency also contends that this proposal does not constitute a negotiable arrangement under section 7106(b)(3) of the Statute. The Agency maintains that the proposal is not an "arrangement" because it does not address adverse effects flowing from the exercise of a management right, but, rather, seeks to create a benefit for employees. The Agency contends that, even assuming that the proposal were an arrangement, it is not "appropriate" because it excessively interferes with the exercise of management's right to make selections for appointments from any appropriate source. In this regard, the Agency argues that this proposal would prevent it from selecting an outside candidate for a vacancy except in narrow circumstances and that this limitation would serve to discourage the Agency from surveying appropriate sources for the most qualified candidate. In particular, the Agency contends that this proposal would inhibit its ability to recruit candidates from underrepresented groups pursuant to affirmative action plans. Relying on Nuclear Regulatory Commission v. FLRA, 895 F.2d 152 (4th Cir. 1990)

and American Federation of Government Employees, Local 1923 and U.S. Department of Health and Human Services, Health Care Financing Administration, Baltimore, Maryland, 44 FLRA 1405, 1488 (1992) (Health Care Financing Administration), the Agency asserts that this proposal is not negotiable under section 7106(b)(3) of the Statute.

The Union concedes that this proposal directly interferes with management's right to select from any appropriate source under section 7106(a)(2)(C) of the Statute. However, the Union contends that the proposal does not excessively interfere with that right and is negotiable under section 7106(b)(3) as an appropriate arrangement. The Union states that under the proposal, the Agency may select from an "outside" source "at anytime" [sic] as long as the outside candidate has better qualifications than candidates who are already employed by the Bureau of Prisons. Response at 2. According to the Union, this proposal benefits current employees by providing them with increased career advancement opportunities. The Union argues that denial of the proposed benefit would adversely affect current Bureau of Prisons employees by restricting their "upward mobility." *Id.* at 3. In response to the Agency's argument concerning its ability to hire candidates from underrepresented groups, the Union contends that the proposal would present no impediment to such recruitment because the qualifications of internal candidates would not be "relatively equal" to that of the candidate from an underrepresented group. *Id.*

V. Analysis and Conclusions

As the Union acknowledges, this proposal directly interferes with management's right to select employees for appointments in filling positions under section 7106(a)(2)(C) of the Statute. That management right reserves to the agency the discretion to determine the source from which it will make a selection. See, for example, Defense Mapping Agency, Louisville, 45 FLRA at 78. It also reserves to the agency the discretion to determine which candidates are better qualified than others when considering candidates for selection when filling a vacancy. *Id.* Thus, a tie-breaking procedure is negotiable if management is able to determine the source from which it will select and whether candidates are equally qualified for the position. See, for example, Overseas Education Association, Inc. and Department of Defense Dependents Schools, 29 FLRA 734, 793 (1987) (proposal that required the agency to use seniority as a tie-breaker if management determined that two or more employees were equally qualified and where management had determined to make the selection from one source, found negotiable because it did not interfere with management's right under section 7106(a)(2)(C) of the Statute), *aff'd as to other matters*, 872 F.2d 1032 (D.C. Cir. 1988). This

proposal would prevent the selection of an outside candidate for a vacancy unless that candidate was better qualified than any candidates who were currently Bureau of Prisons employees.³ Consequently, it directly interferes with management's right to make selections for appointments in filling positions.

Now we turn to the question of whether this proposal is negotiable under section 7106(b)(3) as an appropriate arrangement notwithstanding the fact that it directly interferes with a management right. In National Association of Government Employees, R14-87 and Kansas Army National Guard, 21 FLRA 24, 29-33 (1986) (Kansas Army National Guard), the Authority developed a framework to determine whether a proposal constitutes an appropriate arrangement within the meaning of section 7106(b)(3) of the Statute. Under that framework, we determine whether the proposal is intended as an arrangement for employees who may be adversely affected by the exercise of management's rights. If we find that the proposal is intended as an arrangement, we determine whether that arrangement is appropriate or whether it excessively interferes with the exercise of management's rights.

Applying the framework established in Kansas Army National Guard, we find that this proposal does not constitute an arrangement within the meaning of section 7106(b)(3) of the Statute. In order for us to conclude that a proposal is intended as an arrangement under section 7106(b)(3), the record must demonstrate that the proposal seeks to mitigate the adverse effects on employees of the exercise of a management right. . . . *Id.* at 31. Thus, a proposal is not an arrangement merely because employees would be adversely affected by the denial of a benefit provided by the proposal. See Border Patrol, 46 FLRA at 960; National Treasury Employees Union and U.S. Department of the

³ The Union states that under this proposal, the Agency may select from an outside source at any time as long as the outside candidate has better qualifications than candidates who are current Bureau of Prisons employees. This statement is consistent with the wording of the proposal and we reject the Agency's characterization of this proposal as preventing concurrent consideration of outside and inside candidates. Compare Health Care Financing Administration, 44 FLRA at 1494 (proposal requiring that first consideration be given to bargaining unit employees but which did not prevent the agency from concurrently soliciting candidates from other appropriate sources was a negotiable procedure) with National Association of Government Employees, Local R5-165 and Tennessee Air National Guard, 35 FLRA 886, 889-90 (1990) (proposal precluding management from soliciting or considering outside candidates for bargaining unit positions until after the merit placement process for unit employees was completed directly interfered with management's right under section 7106(a)(2)(C) of the Statute).

Treasury, Office of Chief Counsel, Internal Revenue Service, 45 FLRA
1256, 1258-59 (1992).

This proposal seeks a benefit for employees. The adverse effects that the Union identifies in support of its claim that this proposal constitutes an appropriate arrangement flow from the denial of the benefit sought. It is not apparent from the record that the proposal otherwise seeks to ameliorate adverse effects that flow from the exercise of a management right. *Compare, for example, Kansas Army National Guard* (the Authority concluded that a provision requiring that when filling specified vacancies management must select an employee who had been demoted through reduction-in-force and, thus, adversely affected by the exercise of a management right constituted an appropriate arrangement under section 7106(b)(3)). Consequently, we conclude that this proposal is not an arrangement for employees adversely affected by the exercise of a management right within the meaning of section 7106(b)(3) of the Statute. In view of this conclusion, it is not necessary to determine whether the proposal excessively interferes with management's right to make selections under section 7106(a)(2)(C) of the Statute.

Accordingly, the proposal is nonnegotiable.

* * *

2. Appropriate arrangements for employees adversely affected--
Section 7106(b)(3).

The prior case ends with a discussion of whether the union proposal constitutes an appropriate arrangement. The FLRA adopted the "excessive interference" test to determine the negotiability of a proposed appropriate arrangement which interferes with the exercise of a management right. See, Kansas Army National Guard, 21 FLRA 24 (1986). The test and important factors are listed below:

(1) Does the union proposal concern an arrangement for employees detrimentally affected by management's actions? If not, then the proposal is not an appropriate arrangement within the meaning of section 7106(b)(3). See AFGE and Alaska NG, 33 FLRA 99 (1988).

(2) If so, the FLRA will then determine whether the arrangement is appropriate, or inappropriate because it excessively interferes with management rights. Some factors to consider:

- (a) What conditions of employment are affected and to what degree?
- (b) To what extent are the circumstances giving rise to the adverse affects within the employees' control?
- (c) What is the nature and extent of impact upon management's ability to deliberate and act pursuant to its statutory rights?
- (d) Does the negative impact on management rights outweigh any benefits to be derived from the proposed arrangement?
- (e) What is the effect on effective and efficient government operations?

If, after applying this test, implementation of the union proposal would excessively interfere with the exercise of management's reserved rights, the proposal is nonnegotiable.

The excessive interference test may not normally be applied to government-wide regulations. An exception would be when government-wide regulations restate section 7106 rights. OPM v. FLRA, 864 F.2d 165 (D.C. Cir. 1988).

Management must carefully examine union allegations to ensure that the union has articulated an adverse effect. In IRS v. FLRA, 960 F.2d 1068 (D.C. Cir. 1992) the agency and union had entered into an agreement that employees would be paid extra if detailed to a higher graded position for more than one pay period. When management regularly assigned employees to temporary details of less than one period, the union proposed a provision that would prevent details for less than one pay period to avoid paying the higher wages. When the FLRA found this was not excessive interference, the court reversed finding that the detail was a benefit and that the mere denial of a benefit was not an adverse affect warranting application of the excessive interference test.

In those instances when an adverse effect is found, the appropriate arrangement must be tailored to redress only the employees affected. In Interior Minerals Management Service v. FLRA, 969 F.2d 1158 (D.C. Cir. 1992) the court found union proposals concerning implementation of a drug testing program to be inappropriate. The proposals dealt with all employees when the only employees adversely affected were the few who would test positive for drugs.

3.4 Approval of the Collective Bargaining Agreement.

Upon completion of negotiations, both parties will sign the agreement and it will be forwarded to higher headquarters for review. Section 7114(c) provides:

(c)(1) An agreement between any agency and an exclusive representative shall be subject to approval by the head of the agency.

(2) The head of the agency shall approve the agreement within 30 days from the date the agreement is executed if the agreement is in accordance with the provisions of this chapter and any other applicable law, rule or regulation (unless the agency has granted an exception to the provision).

(3) If the head of the agency does not approve or disapprove the agreement within the 30-day period, the agreement shall take effect and shall be binding on the agency and the exclusive representation subject to the provisions of this chapter and any other applicable law, rule, or regulation.

The purpose of the statutory provision is to ensure the effective time of the new contract is not held in abeyance pending higher headquarters' approval. The review of the contract could continue indefinitely so that without this statutory provision, implementation of the contract could be unreasonably delayed. With it, the contract becomes effective on the 31st day after execution regardless of the promptness of the higher headquarters' review of the CBA.

Can the head of the agency disapprove any and all provisions of the contract and force the parties to return to the bargaining table to renegotiate the discovered clauses? The answer is "no." Once the contract is signed at the installation, all provisions, with the exception discussed below, become effective upon the agency head's approval or on the 31st day after execution, whichever is sooner.

However, if a contract clause is contrary to statute (to include the management rights section or any other section of the CSRA), rule or government-wide regulation, the clause is void. The remainder of the contract will go into effect and those clauses will be renegotiated or deleted.

Higher headquarters power to review collective bargaining agreements for compliance with law and appropriate level regulations extends to contract provisions imposed by the Federal Service Impasses Panel, Interpretation and Guidance, 15 FLRA 564 (1984).

See also, Pacific Missile Test Center, Point Mugu, California, 8 FLRA 389 (1982).

3-5. Right of Exclusive Representatives to Attend Formal Meetings/Investigatory Examinations Between Management and Employees.

a. Statutory Provisions.

5 U.S.C. § 7114, establishes an exclusive representative's right to represent unit employees. This includes granting the exclusive representative the right to attend certain formal meetings and investigatory examinations between management and unit employees. Section 7114(a)(2) provides as follows:

(2) An exclusive representative of an appropriate unit in an agency shall be given the opportunity to be represented at:

(A) any formal discussion between one or more representatives of the agency and one or more employees in the unit or their representative concerning any grievance or any personnel policy or practices or other general condition of employment; or

(B) any examination of an employee in the unit by a representative of the agency in connection with an investigation if-

(i) the employee reasonably believes that the examination may result in disciplinary action against the employee and

(ii) the employee requests representation.

(3) Each agency shall annually inform its employees of their rights under paragraph (2)(B) of this subsection.

b. Formal Discussions.

The above section specifically requires an agency to afford the exclusive representative an opportunity to be represented at any formal discussion between management and an employee concerning grievances, personnel policies and practices, or other matters affecting general working conditions of employees in the unit. The intent is to provide the exclusive representative with the opportunity to safeguard the interests of unit employees at formal meetings held by management. It requires management to give the union reasonable advance notification of the time, place and general subject of the meeting and an opportunity to attend the meeting. If the union has been properly notified and does not appear at the meeting, it has waived the right to be represented and the meeting may be held without the union. "Represented" includes not only the right to be present at the meeting but the right to fully participate in the discussion. The mere inadvertent presence of union officials is insufficient to satisfy management's duty under the Statute. That is, management must

actually notify the union of the time and place of the meeting so that it might choose its own representative. McClellan AFB, 29 FLRA 594 (1987).

There is no right of representation at nonformal meetings or interviews held by management; thus, the problem is one of defining "formal" and "nonformal." A "formal discussion" is determined by the composition of the persons in attendance and the content of the discussions.

Any personnel policy or practices, or other general conditions of employment are those subjects which affect employees in the unit generally, as opposed to individually.

Meetings discussing changes in personnel policies or practices or general working conditions clearly require that the union be given an opportunity to be represented. It has also been determined that the union has the right to be represented at meetings discussing existing personnel policies, practices and general working conditions.

"Grievance" is any matter in which an employee is seeking redress from management to include redress sought through third parties such as the Merit Systems Protection Board. VA Medical Center, Denver, Colorado v. FLRA, 44 FLRA 408 (1992).

This is more than a gripe. The exclusive representative has a right to be present at any grievance discussion affecting unit employees. This right exists at all stages of the grievance procedure and includes the so-called "informal" stage in which an employee is initially discussing the grievance with the supervisor. (Note: a pre-disciplinary oral reply of an employee is not considered a formal discussion and the exclusive representative has no right to be present. DOJ v. AFGE, 29 FLRA 52 (1987)). It also includes a meeting with any management representative and any unit employee involving an adjustment of the grievance, or meetings to interview employee witnesses for third-party proceedings, such as MSPB hearings or EEOC hearings. NTEU v. FLRA, 774 F.2d 1181 (D.C. Cir. 1985); McClellan AFB, supra. This right exists even if the employee does not want the union present because the union represents the interests of all bargaining unit employees, and any grievance could impact on other employees.

Several meetings between an employee and management representatives on individual employee matters have been found not to fall within the definition of this term.

They include counseling sessions, SSA and AFGE, 14 FLRA 28 (1984); meetings at which an employee is disciplined, discussion of individual job performance and meetings to deliver work instructions or to discuss work assignments. IRS Brookhaven and NTEU, 9 FLRA 930 (1982).

The following case addresses factors determining the "formality" of a discussion:

**SSA, SAN FRANCISCO
and
AFGE
10 FLRA 115 (1982)**

(Summary)

According to the parties' stipulation of facts, the operations supervisor at one of the activity's branch offices, following the 60-day detail of a unit employee to another city, held individual discussions with unit employees in which she solicited comments and suggestions regarding the assignment and distribution of work. The union was given no notice of these discussions.

The General Counsel contended that the individual meetings constituted direct dealings with unit employees concerning conditions of employment and therefore constituted an unlawful bypass of the union. It was also contended that the meetings were formal discussions within the meaning of 5 U.S.C. 7114(a)(2)(A). The activity argued that there was no duty to notify the union because management had the right, under the negotiated agreement, to hold discussions on the day-to-day operations of the activity. It further argued that the meetings were permissible informal contacts for the purpose of obtaining input from the employees. Besides, a union representative was present at a staff meeting at which he did not express his views: hence the union constructively waived its right to "consult" on the matter.

The Authority dismissed both the "bypass" and "formal discussion" allegations because, based on the stipulated facts, the General Counsel did not meet his burden of proving that the individual meetings were either formal discussions or a bypass of the union. The bypass allegation was dismissed because there was no evidence in the record concerning the specific content of the communications. All it showed was that the supervisor initiated the conversations "solely to gather information to assist the Respondent in making a non-negotiable management determination concerning the assignment of work."

The central issue of the case, the Authority noted, was whether the discussions were formal or informal. However, it was unable to determine whether the meetings were formal because

. . . the stipulated facts do not reveal (1) whether the individual who held the discussions is merely [sic] a first-level supervisor or is higher in the management hierarchy; (2) whether any other management representatives

attended; (3) where the individual meetings took place (i.e., in the supervisor's office, at each employee's desk, or elsewhere); (4) how long the meetings lasted; (5) how the meetings were called (i.e., with formal advance written notice or more spontaneously and informally); (6) whether a formal agenda was established for the meetings; (7) whether each employee's attendance was mandatory; or (8) the manner in which the meetings were conducted (i.e., whether the employee's identity and comments were noted or transcribed).

Let us consider each of the factors mentioned by the Authority. It is not clear why it would want to know whether the individual holding the discussion is "merely a first-level supervisor or is higher in the management hierarchy," for certainly a first-level supervisor can conduct a formal discussion. Our guess is that the Authority recognizes that discussions held by first-level supervisors are often informal, involving shop talk and counseling sessions involving an individual's conduct. (See 124 Cong. Rec. H 9650, daily ed., Sept. 13, 1978, where Congressman Ford said the following: "The compromise inserts the word 'formal' before discussions merely in order to make clear that this subsection does not require that an exclusive representative be present during highly personal, informal meetings between a first-line supervisor and an employee are apt to be routine, held at the desks or work stations of the employees, and of brief duration. In short, a large proportion of the discussions between a first-line supervisor and employees under his supervision are going to be "informal." In making the distinction between discussions held by "merely a first-line supervisor" and officials higher in the management hierarchy, the Authority is perhaps sending a signal to the agents of the General Counsel to take an especially critical look at alleged formal discussions held solely by first-line supervisors.

The second factor, whether more than one management representative attended, seems an obvious test of formality. (See, in this connection, the IRS, Fresno Service Center case, 7 FLRA No. 54, S/C #24, where an EEO precomplaint meeting called and chaired by a supervisor and attended by an EEO Officer and an EEO Counselor was found to be a formal discussion.) FLRA also may have mentioned this factor because section 7114(a)(2)(A) itself defines a formal discussion, in part, in terms of "one or more representatives of the agency."

The third factor, involving the location of the discussion, is somewhat elaborated on by the Authority in its parenthetical remarks.

The implication seems to be that discussions held away from the employee's desk or work station are more likely to be formal than discussions held at the employee's desk. (See SSA, San Francisco, 9 FLRA No. 9, where FLRA held that unscheduled and brief meetings held by the branch manager at the desks of individual employees were not formal discussions. Contrast this case with IRS, Fresno, where the precomplaint meeting was held in an office away from the employee's normal work station.)

The significance of the duration factor is perhaps captured by ALJ Heifitz's remark in the nonprecedential AAFES case mentioned above: i.e., the meeting has to be of sufficient duration to allow for a discussion of the condition of employment. (The briefness of the conversations held by the branch manager in the SSA, San Francisco case is one of the factors cited in supporting the conclusion that the meetings were not formal discussions.)

The fifth factor, how the meetings were called, also is elaborated on by the Authority in its parenthetical comments. Presumably, written notice of a meeting tends to indicate "formality." (In EPA, 8 FLRA No. 98, the ALJ found that a discussion that was not prearranged but based on a spur-of-the-moment request by the branch chief that her secretary enter her office to sign a written assurance concerning the employee's acceptance of a permanent job at another agency was not a formal discussion.)

The "agenda" factor is illustrated by the Authority's decision in the HEW, Atlanta case, 5 FLRA No. 58, where it held that new employee orientation sessions were formal discussions because, among other things, an agenda had been established by management to discuss a number of matters involving general conditions of employment.

The HEW, Atlanta case also illustrates the "mandatory attendance" factor--the seventh listed by the Authority. That case should be contrasted with the IRS, Brookhaven Service Center case, 9 FLRA No. 132, where the Authority held that noncoercive interviews of unit employees in preparation for third-party proceedings do not constitute formal discussions provided that certain precautions, such as obtaining the employee's participation on a voluntary basis, are taken.

The eighth and final factor, whether a record or notes of the meeting were kept, is a rather obvious indicator of formality. But there are exceptions. For example, the management representative conducting a Brookhaven pre-hearing interview almost certainly will take notes. However, the note-taking indicator of formality is nullified by, among other

things, the fact that employee participation is voluntary--an indicator, as suggested above, that a meeting is not a formal discussion.

Although the Authority's checklist of factors to consider should be of some help in determining whether a meeting is "formal," it is hardly a formula. There is no suggestion that a certain number of the criteria must be satisfied before a meeting can be regarded as "formal." Nor is there any indication as to the relative importance of each criterion.

Note: For a good discussion on formal discussion and Brookhaven Warnings, see Marine Corps Logistic Base and AFGE, 45 FLRA 1332 (1992); Veterans Administration and AFGE, 41 FLRA 1370 (1991).

c. Investigatory Examinations.

Section 7114(a)(2)(B) gives the exclusive representative a right to be present at "any examination of an employee in the unit by a representative of the agency in connection with an investigation if:

- (i) the employee reasonably believes that the examination may result in disciplinary action against the employee; and
- (ii) the employee requests representation.

This right is generally called the "Weingarten Right," that being the case which gave the right to employees in the private sector. See NLRB v. Weingarten, 420 U.S. 251 (1975).

Understanding key terms is important. To qualify as an investigatory examination, the meeting must involve questioning of an employee as part of a searching inquiry to ascertain facts. "Agency representative" includes supervisors, management officials, personnel specialists, internal agency auditors, and inspectors general. The term is broadly defined and applied. Defense Logistics Agency, 28 FLRA 1145 (1987). The term "examination" is also broadly construed. It need not be confrontational. A request to provide a written statement regarding an incident has been found to be an examination. INS, Del Rio, Texas and NAGE Local 2366, 46 FLRA No. 31 (1992).

The right of the union to be present is triggered only by the employee's request. If the employee does not request representation, management may hold the meeting without union notification. Management is not required to notify the employee of this right at the meeting. Management's obligation to notify the employee consists of an annual notification to all employees. § 7114(a)(3). If union representation is requested,

management has three alternatives: allow a representative to attend; end the interview; or give the employee the option (in a non-threatening manner) of either answering the questions without the representative or having no interview. Bureau of Prisons, Leavenworth, 46 FLRA No. 72 (1992).

In Navy Public Works Center, 4 FLRA 217 (1980), the Authority held that a union proposal giving employees the right to remain silent during discussions with supervisors which might lead to disciplinary action, was bargainable. The Ninth Circuit Court of Appeals refused to enforce this ruling. While recognizing the requirement for impact bargaining, the court believed this union proposal would severely erode, if not destroy, management's nonnegotiable authority to discipline under the statute. IBEW, Local 1186 v. Navy Public Works Center, Pearl Harbor, 678 F.2d 97 (9th Cir. 1982).

Agency negotiators should generally avoid giving greater rights in the form of warnings prior to interviews than those required by the CSRA. Miguel v. Department of the Army, 727 F.2d 1081 (Fed. Cir. 1984), involved the appeal of an MSPB decision that upheld the discharge of an employee for theft. One of three bases cited by the court for overturning the discharge, was the agency's failure to provide the employee with all the warnings required by the collective bargaining agreement.

The remedy for violation of the Weingarten rights is the revocation of any disciplinary action that flow from the examination. In Dept of Navy v. FEMTC, 32 FLRA 222 (1988), the Authority ruled that if disciplinary action is taken against an employee for engaging in protected activity a make whole remedy is appropriate. However, a make whole remedy will not be ordered where the disciplinary action taken relates solely to an employee's misconduct independent of the examination itself. See also DQJ, Bureau of Prisons, 35 FLRA 431 (1990), rev'd on other grounds, DQJ v. FLRA, 939 F.2d 1170 (5th Cir. 1991).

CHAPTER 4

IMPASSE RESOLUTION

4-1. Introduction.

During the course of negotiating a collective bargaining agreement, certain union proposals may be unacceptable to management, so management will refuse to agree to the proposals. If the union feels strongly about the proposals, it will pursue them further. In the private sector, the strike serves as an incentive for the resolution of negotiation impasses. Because strikes are illegal in the federal sector (5 U.S.C. § 7311), there must be some other means of impasse resolution if collective bargaining is to be meaningful. The Federal Mediation and Conciliation Service and Federal Service Impasses Panel serve as this means. Impasse resolution in general is merely an extension of the collective bargaining process.

CSRA § 7119 authorizes the use of the Federal Service Impasses Panel (hereinafter referred to as the Panel) and the Federal Mediation and Conciliation Service (hereinafter referred to as the FMCS). Both existed under the Executive Order, the latter operating through regional offices located throughout the country.

4-2. The Federal Mediation and Conciliation Service.

The FMCS is an independent agency of the federal government created by Congress with a Director appointed by the President. Federal mediators, known as commissioners, are stationed throughout the country.

FMCS rules require that parties to a labor agreement file a dispute notice if they do not agree to a new collective bargaining agreement at least 30 days in advance of a contract termination or reopening date. The notice must be filed with the FMCS and the appropriate state or local mediation agency. The notice alerts FMCS to possible bargaining problems. If an impasse evolves, either party may request the services of the FMCS.

While methods and circumstances vary, the mediator will generally confer first with one of the parties involved and then with the other to get their versions of the pending difficulties. Then he will usually call joint conferences with the employer and the union representative to try to get them to agree. If this fails to resolve the impasse, either or both parties, or the FMCS on its own, may request the Panel to become involved by considering the issue itself or approving the use of binding arbitration.

4-3. Federal Service Impasses Panel.

The Panel consists of a chairman and at least six members, all of whom serve part-time to the extent dictated by caseload. The Panel meets monthly in Washington, D.C. with three members constituting a forum. The Chairman is responsible for overall leadership and direction of its operations. An Executive Secretary, assisted by a professional staff of several associates, is responsible for the day to day administration of the Panel's responsibilities.

The Panel attempts to avoid actions which might inhibit the growth of the bargaining process by constantly seeking to prevent its service from being used as a substitute for the parties' own efforts. With this in mind, an impasse has been defined as that point at which the parties are unable to reach full agreement, notwithstanding their having made earnest efforts to reach agreement by direct negotiations and by the use of mediation or other voluntary arrangements for settlement. 5 C.F.R. § 2470.2(e). The Panel will not take jurisdiction of a suit until these requirements have been met.

The Panel's involvement is a two-tiered system. It will first attempt to mediate the impasse, just as the FMCS does. As the Panel can impose a settlement, the parties are often willing to settle at this stage. The second stage is the imposition of a settlement.

Request for Panel consideration of a negotiation impasse must include information about the issues at impasse and the extent of negotiation and mediation efforts. An investigator will be appointed, and a preliminary investigation of the request will be made, to include consultation with the national office of FMCS whose evaluation of mediation efforts is a critical element in the Panel's determination whether it will take jurisdiction. The Panel may decline to assert jurisdiction if it finds that no impasse exists or for other good reason.

If it has determined, however, that voluntary efforts have been exhausted, the Panel normally recommends procedures for the resolution of the impasse or assists the parties in resolving the impasse through whatever methods it considers appropriate. If a hearing to ascertain the positions of the parties is deemed necessary, it is conducted by a designee of the Panel who may also conduct a prehearing conference to inform the parties about the hearing, obtain stipulations of fact, clarify the issues to be heard, and discuss other relevant matters. Basically a formal, but nonadversary proceeding, the hearing gives the parties an opportunity to present evidence relating to the impasse through the testimony of witnesses and the introduction of exhibits. An official transcript is made of the proceeding.

It is the duty of the factfinder to develop a complete record upon which he will base his report to the Panel. The report includes findings of fact on such matters as the history of the current negotiations, the unresolved issues and negotiation efforts with respect to them, justification for the proposals made on the impasse issues, and

prevailing practices in comparable public sector bargaining units. These posthearing reports of the factfinder or other designee of the Panel may contain the factfinder's recommendations for settlement, if authorized by the Panel. Absent such authorization, the report goes directly to the Panel which has the authority to take whatever action it considers appropriate at that point of its procedures. The Panel will normally take one of three actions: (1) require both parties to submit written submissions stating their positions and rebuttals, (2) will require both parties to submit a final offer and the Panel will pick one of them, or (3) will approve a request to have the matter arbitrated. With the former two alternatives, the Panel will give the parties its "recommendation."

The parties have 30 days to accept the recommendations of the Panel or its designee, or otherwise reach a settlement, or notify the Panel why the dispute remains unresolved. If there is no settlement at this stage despite the Panel's efforts, it can take whatever action it considers appropriate, such as imposing the previously issued recommendations or ordering binding arbitration. The regulations underline the fact that such "final action" is binding upon the parties. Failure to comply at this stage may result in an unfair labor practice (5 U.S.C. § 7116).

In those cases when the parties request approval of outside binding arbitration, the parties must furnish information about the bargaining history, issues to be submitted to the arbitrator, negotiability of the proposals, and details of the arbitration procedure to be used. After consideration of such data, the Panel will either approve or disapprove the request.

4-4. Decisions of the Impasses Panel.

Panel decisions were published under the Executive Order and are presently published under Title VII. As each case before the Panel generally turns on its own unique factual situation and is not considered precedent for subsequent cases, it would not be useful to include a multitude of Panel cases in this chapter. The following case is included merely to offer an illustrative example of the types of factors which the Panel considers in reaching its recommendations and demonstrates the procedures involved.

In the matter of
DEPARTMENT OF HOUSING AND
URBAN DEVELOPMENT
ATLANTA, GEORGIA

and

**LOCAL 1568, AMERICAN FEDERATION
OF GOVERNMENT EMPLOYEES, AFL-CIO**

Case No. 85 FSIP 14 (1985)

REPORT AND RECOMMENDATIONS

Local 1568, American Federation of Government Employees, AFL-CIO (Union) filed a request for assistance with the Federal Service Impasses Panel (Panel) to consider a negotiation impasse between it and the Department of Housing and Urban Development, Atlanta, Georgia (HUD or Employer).

The Panel determined that the impasse should be resolved pursuant to written submissions from the parties with the Panel to take whatever action it deemed appropriate to resolve the impasse. Written submissions were made pursuant to these procedures and the Panel has considered the entire record.

BACKGROUND

The dispute arose in the context of impact and implementation bargaining over the consolidation of HUD's Regional and Area Offices in Atlanta. Approximately 300 bargaining-unit employees have been affected by the relocation of offices from 4 floors onto 2 floors which began during September 1984.

THE ISSUES AT IMPASSE

The parties are in dispute over (1) accommodations for the Union's principal office representative and (2) smoking policy.

1. Accommodations for the Union's Principal Office Representative.
 - a. The Union's Position.

The Union proposes that it be provided with office space of at least 150 square feet, enclosed by ceiling-high partitions, situated near a window. It also asks for a credenza and chair in addition to the current furniture. While it would be easily accessible to bargaining-unit employees, the office would also have adequate privacy.

Prior to the move, the Union contends, its office had 117 square feet of space and was located next to a window. Although now placed by a window, there is no guarantee that the office will continue to be at this location. Because of narrow walkways and furniture protruding into the aisles, the current space is inaccessible to the handicapped and other employees can see over the 5-foot high acoustic screens that surround the office. Additionally, those in adjacent work areas make noise which is distracting to Union officials. Ceiling-high partitions are needed in order to guarantee adequate privacy for the Union to conduct its representational activities.

b. The Employer's Position.

Under the Employer's proposal, the office would be located near an entrance to the work area so as to provide easy access to employees. It would have no more than 100 square feet of floor space and would continue to be enclosed by 5-foot high area dividers. The same furniture plus another chair would be provided.

The Employer asserts that prior to the move, the Union had 75 square feet of office and another 17 square feet of usable space on top of the air vents near a window. It now offers a somewhat larger area which is of reasonable size, especially in light of the fact that employees experienced a substantial reduction in space when 17,000 square feet were reallocated. Additionally, there is no reason to provide the Union with ceiling-high partitions which the Employer characterizes as walls. This would give the Union a private office that it did not have prior to the move. Should it need to conduct a private meeting, the Union has access to conference rooms pursuant to the parties' collective-bargaining agreement.

2. Smoking Policy.

a. The Union's Position.

Since many employees now work in open areas instead of enclosed ones, more consideration must be given to the problems by smoking. The Unions proposes, therefore, that smoking be permitted in common-use areas until bargaining-unit employees express concern over

health problems due to smoke. Additionally, the Union would be provided with a list of areas designated as common-use and nonsmoking. This list, which the Union contends would consist of data normally maintained by the Employer, would clearly set forth those areas where smoking could be prohibited.

b. The Employer's Position.

Under the Employer's proposal, an employee could post a no-smoking sign while working in a common-use area. Since an employee would have responsibility for posting such a sign, it would mean that individuals could smoke if no one objected. The Employer would not provide a list of areas designated as common-use and nonsmoking. Not only does it not normally maintain such a list, but also it would be burdensome to keep one.

DISCUSSION

With respect to the first issue, the parties are looking to the Panel to determine the type of accommodations to be provided to the Union's representative. Based upon our consideration of the record before us, we conclude that the Employer's proposal provides a reasonable basis for settlement, especially in view of the fact that there has been a reallocation of a substantial amount of space. As the representative's office would be easily accessible under the Employer's proposal, services should be readily available to bargaining-unit employees. Since it is possible to see over the 5-foot high dividers, however, employees may be reluctant to seek the assistance of the Union and its activities could otherwise be hindered by such lack of privacy. Accordingly, we amend the proposal to include ceiling-high movable dividers. This should ensure the Union adequate privacy as well as reduce noise levels in the office.

With respect to the smoking policy, neither party's proposal is appropriate for resolution of the dispute. The Union's proposal is ambiguous and could generate grievances. That is, it is unclear as to what constitutes "concern" about a health problem, the effect of the expression of such concern, and whether smoking would be allowed again after such concern was displayed. The Employer's proposal is not acceptable because it may result in the prohibition of smoking in just part of a common-use area. Neither of the proposals clearly comes to grips with health hazards associated with cigar, pipe, and cigarette smoke. To provide adequate protection for nonsmoking employees, therefore, especially those working in open areas, the Employer should prohibit smoking by employees except in a few, appropriately designated locations where they may smoke while on breaks. This would ensure that

nonsmoking employees are protected in the workplace from the dangers associated with passive smoking, while affording those employees who choose to smoke the opportunity to do so somewhere on the premises.

RECOMMENDATIONS

We make the following recommendations for settlement.

1. Accommodations for the Principal Office Representative.

The parties shall adopt the Employer's proposal as amended to provide for movable, ceiling-high area dividers.

2. Smoking Policy.

The parties shall adopt the following wording:

Employees shall work, to the maximum extent feasible, in a smoke-free environment. Separate areas will be designated in which employees will be permitted to smoke on their breaks.

By direction of the Panel.

As the preceding case indicates, the Panel first recommends a resolution to the parties. Usually, the parties either adopt that recommendation or resolve the impasse in some other way. However, the Panel has occasionally ordered the parties to write prescribed terms into their next agreement. See, e.g., AFGE (National Border Patrol Council) v. Immigration & Naturalization Service, 73 FSIP 14 (March 19, 1975); American Federation of Government Employees Local 2151 v. General Services Administration Region III (Washington), 73 FSIP 18 (July 11, 1974).

The Panel's rules and regulations can be found at 5 C.F.R. § 2470. These should be consulted to ascertain the specific procedures to be used when the Panel's services are needed.

There is no statutory provision permitting direct review of an imposed adverse Panel decision. Parties have, therefore, occasionally refused to cooperate with an FSIP order, thereby voluntarily submitting themselves to a ULP proceeding. This lays the groundwork for review by the Authority and possibly the courts. Council of Prison Locals v. Brewer, 735 F.2d 1497 (D.C. Cir. 1984); Florida National Guard and National Association of Government Employees, 9 FLRA 347 (1982).

FSIP may use a variety of methods to resolve an impasse, but it cannot resolve the underlying obligation to bargain. NTEU, 11 FLRA 626 (1953). The panel can resolve an impasse relating to a proposal concerning a duty to bargain if it applies to existing (Authority) case law. Canswell AF Base v. AFGE, 31 FLRA 620 (1988).

The FLRA has finally resolved when Agency Head review is allowable under § 7114(c) of interest arbitration awards. The Authority ruled in Patent and Professional Association and Department of Commerce, 41 FLRA 795 (1991), that impasses resolved under § 7119(b)(1) are subject to Agency Head review under § 7114(c). Impasses resolved under § 7119(b)(2) are not subject to Agency Head review under § 7114(c), but are reviewable under § 7122.

CHAPTER 5

UNFAIR LABOR PRACTICES

5-1. Procedures (5 U.S.C. § 7116; 5 C.F.R. § 2423).

An unfair labor practice is a means by which either management, a labor organization, or an employee can effect compliance with the CSRA, and is a means to obtain a remedy against a violator of the statute. If one party acts in a manner inconsistent with the statute, the other party may file an unfair labor practice charge with the Regional Director, who will investigate and file a complaint if the allegation has substance. The Regional Director, acting for the General Counsel, will prosecute the complaint before an administrative law judge (ALJ). If the ALJ sustains the ULP, his report and recommendation, with exceptions by the parties, will be forwarded to the Authority who will issue an order requiring the wrongdoer to cease and desist from the complained of acts. It will be posted in the work area of the employees for 60 days. Failure to comply with the order may result in Federal court involvement and harsher sanctions.

Section 7116, CSRA, lists the unfair labor practices. The statute incorporates the unfair labor practice provisions of Executive Order 11491, with a few additional ones. The unfair labor practice procedures are located at Title 5, Code of Federal Regulations 2423.

Informal Procedures. The Authority encourages the parties to resolve disputes informally. 5 C.F.R. Part 2423.7 attempts to effectuate this policy by delaying the investigation of a ULP complaint for fifteen days after filing of the charge, to allow the parties to attempt to informally resolve the complaint. The Authority also encourages the parties to include informal procedures in the collective bargaining agreement.

The Charge. The charge is an allegation of an unfair labor practice filed directly with the appropriate Authority regional office within six months of the wrong. The rules set forth the procedural requirements for filing an ULP charge. The charge is an informal allegation, as opposed to a complaint which is akin to a formal, legal indictment. Any "person" (an individual, labor organization or agency) may file a charge against an activity, agency, or labor organization.

Unfair labor practice charges must be submitted on forms supplied by the regional office. Aside from the required identifying information (e.g., name, address, telephone number, etc.), the form must contain a clear and concise statement of the facts constituting the alleged ULP, including the date and place of the occurrence. The charging party must submit any supporting evidence and documents along with the charge.

The Investigation. When the charge is received in the regional office, it will be docketed, assigned a case number, and investigated to the extent deemed necessary by the Regional Director. All involved parties will have an opportunity to present evidence. All persons are expected to cooperate. Statements and information supplied to the regional office will be held in confidence.

Extent of Investigation. The regional office will conduct some form of investigation for almost every charge received. It may range from as little as a telephone conversation to an extensive, on-site search for information. Both the charging party and the Respondent may recommend that the regional office look into certain matters. The Regional Director will have the final say in this regard. Experience to date demonstrates that the parties can expect an on-site investigation only if the Authority has adequate funds. In the recent past these funds were not always available.

Role of the Regional Office. During the investigative stage, it the General Counsel's policy for the regional office to assume an impartial fact-finder role. The objective is to gather the facts and arguments on both sides of the issue so that a decision as to the merits of the charge may be made by the Regional Director. Some managers have expressed displeasure with the approach taken by some investigators from regional offices, feeling that the investigators are biased in favor of the charging party.

Regional Director's Options. After the regional office receives and investigates an ULP charge, it has some options as to what to do with it. It may refuse to issue a complaint, may request the charging party withdraw or to amend it, or it may issue a complaint and notice of hearing.

Withdrawals. Only the charging party may withdraw a charge, and then only with the approval of the Regional Director. ULP charges are matters dealing with public rights, as opposed to private rights, and the General Counsel is responsible for enforcing these rights. Hence the requirement for the Regional Director's approval. The only time a Regional Director's approval may be difficult to obtain is when individual employee's rights are involved and the agreed-upon settlement does not serve to adequately remedy violations which affect employees.

Withdrawals arise under a number of different circumstances. First, the charging party may decide to unilaterally withdraw the charge for reasons unknown. More often, the regional office will complete its investigation, find no merit in the ULP charge, and suggest to the charging party that it withdraw the charge or face dismissal. Finally, management and the union, with or without the regional office's assistance, may agree to a settlement which is conditioned upon the union's withdrawal of the charge.

Dismissals. A dismissal by the Regional Director is disposition of an ULP charge with prejudice and without the concurrence of the charging party. The dismissal letter

from the Regional Director will state the reason(s) for the action and is subject to review on appeal within 25 days to the General Counsel's office in Washington, DC. The decision of the General Counsel is final and not subject to further review. Turgeon v. FLRA, 677 F.2d 937 (D.C. Cir. 1982).

Dismissals may occur for a number of reasons. If the regional office investigates and finds no merit, and the charging party refuses to withdraw, the Regional Director may dismiss the charge. Dismissals may also occur for procedural or jurisdictional reasons. For instance, if the charge is untimely filed or the Regional Director determines that the issue has been raised under a grievance or appeals procedure pursuant to Section 7116(d) of the statute, the charge should be dismissed. It is also possible for the Respondent and the Regional Director to enter into a settlement of the charge without concurrence of the charging party. In this case, the Regional Director will dismiss the charge.

Timeliness of the Charge. The Authority's regulations provide that a charge must be filed within six months of the occurrence of the unfair labor practice (with some exceptions). When a charge is filed more than six months after the event in question, the respondent should assert that the charge is not timely filed.

Defects in the Charge. If there has been a failure to follow the regulations with respect to the contents of the charge, service of it, or the filing of it, such should be asserted. The failure to follow filing procedures constitutes prejudice to the respondent if it is more than a mere technical defect. The Authority will permit the defect to be corrected by the charging party if it is a mere technical defect.

Wrong Appeal Route. Section 7116(d) provides that issues "which can properly be raised under an appeals procedure may not be raised as an unfair labor practice." When grievants raised the issue of non-production of requested information in connection with disciplinary actions taken against them, thus exercising their option to raise the issue under a grievance procedure or by unfair labor practice complaint under section 7116(d) of the Statute, the union could not thereafter, independently raise the same issue in an unfair labor practice complaint. IRS, Chicago, Illinois and NTEU, NTEU Chapter 10, 3 FLRA 478 (1980).

Amendments to Charges. The rules state that the charging party may amend the charge at any time prior to issuance of a complaint. Oftentimes, the regional office, upon completion of its investigation, will recommend to the charging party that it amend the charge. The charge will then accurately cite the alleged incident(s) and violations so that any complaint (which is issued later) will not contain surprises for the parties.

Issuance of Complaints. The Regional Director will issue a complaint if there appears to be merit in the ULP charge and the case remains unsettled. The General Counsel has also expressed an interest in issuing complaints in those cases he categorizes as "elucidating," i.e., cases which raise issues under a statute that have not

been tested before the Authority. The issuance of a complaint by a Regional Director cannot be appealed by the Respondent to the General Counsel for review. (Refusal to issue a complaint may be appealed to the General Counsel.)

Answer. The Respondent has twenty days after service of the complaint to answer it. He serves the answer on the Chief Administrative Law Judge and on all parties.

Settlements. If there is some substance to the allegation, the Regional Director will exert considerable pressure upon the parties to reach a settlement agreement. Management will settle when there are advantages to such. For instance, if it is clear an unfair labor practice has been committed, a settlement will result in termination of the proceedings and a saving in the use of resources. Often management will settle those cases in which a "nonadmission of guilt" is part of the settlement agreement. ("It is understood that this does not constitute an admission of a violation of the statute.")

NOTE: Prior settlement offers are not admissible at ALJ hearings on unfair labor practices. See 56th CSG, MacDill AFB and NFFE Local 153, 44 FLRA 1098 (1992).

The Hearing. The date, time, and place of the hearing are contained in the complaint. Typically, the hearing will be conducted at or near the activity involved in the case. An administrative law judge will preside at the hearing. The Federal Rules of Civil Procedure do not apply to ULP hearings; rather the proceedings are generally governed by the Administrative Procedures Act contained in Chapter 5 of Title 5 of the U.S. Code. These rules assure that the basic tenets of due process will apply to ULP hearings. The ALJ is empowered to make rulings on motions, objections, and to otherwise control and conduct the hearing. Either party may call witnesses and has the right to examine or cross-examine all witnesses. The General Counsel has the burden of proving the allegations of the complaint by a preponderance of the evidence.

Motions. Motions may be made in writing prior to the hearing, or in writing or orally after the hearing opens. Responses to motions must be made within five days after service of the motion. Interlocutory appeals are not permitted for motion rulings. Rather, motion rulings are considered by the Authority if the case is appealed.

ALJ Decision and Exceptions. Upon receipt of briefs, if any, the ALJ will prepare his or her decision expeditiously and transmit it to the FLRA while serving copies on the parties. Any party may file exceptions to the Authority decision, in writing, with the Authority. The rules set forth a 25-day time limit from the date of service of the ALJ decision in which to file exceptions.

FLRA Decision and Order. The rules outline the Authority's role in making the final ULP decision and in fashioning a remedy. If exceptions to the ALJ decision are filed with the Authority, it will provide a decision complete with discussion and its rationale for affirming, reversing, or modifying the ALJ's decision. If exceptions have

not been filed, the Authority simply adopts the ALJ's decision without discussion. In either case, the Authority ruling serves as the final administrative decision on the matter. These decisions are published by the Authority and may be obtained from the Government Printing Office.

The Federal Labor Relations Authority has broad remedial power in ULP cases. The most common remedy is for the losing party to sign a notice promising not to engage in violative conduct in the future (Cease and Desist Order). If the circumstances of the case warrant, the Authority may award back pay to affected employees or order the losing party to revert to the status quo ante by taking any other affirmative action which is deemed appropriate.

Judicial Review. Within 60 days of the date of the Authority's decision and order, any aggrieved party may initiate an action for judicial review in the appropriate U.S. Circuit Court of Appeals. Section 7123 of the statute sets forth the requirements and procedures for judicial review. To file a petition for judicial review of an Authority decision, Federal agencies must work through the appellate division of the Department of Justice. The Justice Department has the final say as to whether or not court action will be initiated.

Strikes. There is a special provision in Title VII governing enforcement of the "no strike" provision for unions (Federal employees and their unions are not allowed to engage in work slowdowns or strikes). If the Authority should find the exclusive representative violated Section 7116(b)(7), CSRA, the following sanctions may be taken:

- (1) Revoke the exclusive recognition status of the labor organization (decertification), and
- (2) Take any other appropriate disciplinary action.

See PATCO v. FLRA, 685 F.2d 547 (D.C. Cir. 1982).

Temporary Relief. Section 7123(d), CSRA, sets forth a procedure through which the Authority may seek temporary relief in an unfair labor practice case. Upon issuance of an unfair labor practice complaint, the Authority may petition a District Court for appropriate temporary relief, to include a restraining order. This is used in those cases where the unfair labor practice continues, in spite of the filing of a charge and issuance of a complaint.

Unfair Labor Practices: Section 7116, CSRA defines the unfair labor practices:

- (a) For the purpose of this chapter, it shall be an unfair labor practice for an agency--
 - (1) to interfere with, restrain, or coerce any employee in the exercise by the employee of any right under this chapter;

(2) to encourage or discourage membership in any labor organization by discrimination in connection with hiring, tenure, promotion, or other conditions of employment;

(3) to sponsor, control, or otherwise assist any labor organization, other than to furnish, upon request, customary and routine services and facilities if the services and facilities are also furnished on an impartial basis to other labor organizations having equivalent status;

(4) to discipline or otherwise discriminate against an employee because the employee has filed a complaint, affidavit, or petition, or has given any information or testimony under this chapter;

(5) to refuse to consult or negotiate in good faith with a labor organization as required by this chapter;

(6) to fail or refuse to cooperate in impasse procedures and impasse decisions as required by this chapter;

(7) to enforce any rule or regulation (other than a rule or regulation implementing section 2302 of this Title) which is in conflict with any applicable collective bargaining agreement if the agreement was in effect before the date the rule or regulation was prescribed; or

(8) to otherwise fail or refuse to comply with any provision of this chapter.

(b) For the purpose of this chapter, it shall be an unfair labor practice for a labor organization--

(1) to interfere with, restrain, or coerce any employee in the exercise by the employee of any right under this chapter;

(2) to cause or attempt to cause an agency to discriminate against any employee in the exercise by the employee of any right under this chapter;

(3) to coerce, discipline, fine, or attempt to coerce a member of the labor organization as punishment, reprisal, or for the purpose of hindering or impeding the member's work performance or productivity as an employee or the discharge of the member's duties as an employee;

(4) to discriminate against an employee with regard to the terms or conditions of membership in the labor organization on the basis of race, color, creed, national origin, sex, age, preferential or nonpreferential civil service status, political affiliation, marital status, or handicapping condition;

(5) to refuse to consult or negotiate in good faith with an agency as required by this chapter;

(6) to fail or refuse to cooperate in impasse procedures and impasse decisions as required by this chapter;

(7) (A) to call, or participate in, a strike, work stoppage, or slowdown, or picketing of an agency in a labor-management dispute if such picketing interferes with an agency's operations, or

(B) to condone any activity described in subparagraph (A) of this paragraph by failing to take action to prevent or stop such activity; or

(8) to otherwise fail or refuse to comply with any provision of this chapter.

Nothing in paragraph (7) of this subsection shall result in any informational picketing which does not interfere with an agency's operations being considered as an unfair labor practice.

(c) For the purpose of this chapter it shall be an unfair labor practice for an exclusive representative to deny membership to any employee in the appropriate unit represented by such exclusive representative except for failure--

(1) to meet reasonable occupational standards uniformly required for admission, or

(2) to tender dues uniformly required as a condition of acquiring and retaining membership.

This subsection does not preclude any labor organization from enforcing discipline in accordance with procedures under its constitution or bylaws to the extent consistent with the provisions of this chapter.

Most ULP's have been filed by unions against management. The remainder of the chapter discusses the specific unfair labor practices and includes illustrative cases of different types of unfair labor practices.

5-2. Interference with Employees Rights.

Section 7116(a)(1) provides it shall be an unfair labor practice for an agency:

to interfere with, restrain, or coerce any employee in the exercise by the employee of any right under this chapter;

Title VII sets forth employee rights in § 7102 as follows:

Each employee shall have the right to form, join, or assist any labor organization, or to refrain from any such activity, freely and without fear of penalty or reprisal, and each employee shall be protected in the exercise of such right. Except as otherwise provided under this chapter, such right includes the right--

(1) to act for a labor organization in the capacity of a representative and the right, in that capacity, to present the views of the labor organization to heads of agencies and other officials of the executive branch of the Government, the Congress, or other appropriate authorities, and

(2) to engage in collective bargaining with respect to conditions of employment through representatives chosen by employees under this chapter.

When management interferes with, restrains, or coerces an employee in the exercise of these rights, it violates § 7116(a)(1).

**FORT BRAGG SCHOOLS and
N.C. FEDERATION OF TEACHERS**

3 FLRA 363 (1980)

(Extract)

* * *

Surveillance

The next issue is whether the attendance of school principals at several union informational meetings held for the teachers constituted a violation of 5 U.S.C. § 7116(a)(1).

During the first few months of 1979, Virginia D. Ryan, State Director of the North Carolina Federation of Teachers, AFT, AFL-CIO, ("AFT") contacted Dr. Haywood Davis, the Superintendent of the Fort Bragg Schools. Her purpose was to get permission to use school mailboxes, bulletin boards, and rooms in order to organize a new AFT chapter and solicit membership among the teachers.⁶

⁶ The Fort Bragg Federation of teachers, Local 3976, was chartered on July 1, 1979.

On April 19, Davis granted her request and told her that meetings could be held in the various schools at 3:30 p.m.⁷

On April 24, 1979, Ryan contacted Davis H. Orr, principal of the Irwin Junior High School. She scheduled a meeting with the Irwin teachers for May 2 and told Orr that he should not attend union informational meetings. She explained the history and objectives of AFT to Orr at an informal gathering on April 24.

Ryan met with Superintendent Davis on May 2 and requested that he ask the school principals not to attend AFT informational meetings. Davis immediately got a legal opinion on the matter by telephone and informed her that he could not prevent their attendance. Subsequently, at 3:30 p.m., Ryan held the scheduled meeting at Irwin School with about 12 teachers. Principal Orr and his assistant were in attendance. Ryan discussed the history of AFT and some of the benefits, goals and objectives of the organization; she also discussed the rights granted to employees and explained how AFT could help the Fort Bragg teachers in this regard. AFT literature and membership applications were made available to the teachers at the meeting. The meeting included a question and answer period.

Subsequently, Ryan held identical meetings with seven to 10 teachers at the McNair Elementary School (May 3), Bowley Elementary School (May 8), and Butner Elementary School (May 10). The May 3 meeting was attended by Principal Richard M. Ensley, the May 8 meeting by Principal Forrest H. Deshields, and the May 10 meeting by Principal Stahle H. Leonard, Jr. In each case the principal was sitting in full view of all teachers attending. Deshields attended in spite of Ryan's specific request to him just before the May 8 meeting that he not attend and her warning that she might have to file a charge against him if he did.

Counsel for the General Counsel argues that the presence of the principals at the four above-mentioned informational and organizational meetings constituted a violation of 5 U.S.C. § 7116(a)(1) because, in each case, it interfered with, restrained, or coerced the employees in the exercise of their § 7102 rights to form, join, or assist a labor organization. It is well settled in the private sector that overt surveillance by management supervisors of employees while the latter are attending union organizational meetings is prohibited by § 8(a)(1) of the National

⁷ Children were expected to be off school grounds by that time and the teachers' "normal" duty day was over at 3:45 p.m. (G.C. Ex. 4, p. 32-33).

Labor Relations Act, 29 U.S.C. § 158(a)(1) because it interferes with comparable protected rights. National Labor Relations Board v. Collins & Aikman Corp., 146 F.2d 454 (4th Cir. 1944); N.L.R.B. v. M & B Headwear Co., 349 F.2d 170, 172 (4th Cir. 1965).

Respondents argue that the employees in the instant case were not shown to be affected by the presence of the school principals. However, this is not a necessary element of proof to sustain a violation. The test is whether the action by the supervisors "tended" to have a chilling effect on the exercise by the employees of their protected rights. N.L.R.B. v. Huntsville Manufacturing Co., 514 F.2d 723, 724 (5th Cir. 1975). In the instant case the teachers were aware that their immediate supervisor was watching them and, for example, was in a position to take note of any indication during the question and answer period of an employee's interest in how working conditions could be improved by means of collective bargaining. It is reasonable to infer that some employees might have felt inhibited by the presence of their supervisor from showing an interest and asking questions. Some may have been concerned that their supervisor even knew that they attended the meeting for fear of subsequent reprisal.⁸ The meetings in question were designed and advertised for teachers, not principals; therefore, the awkward presence of the principals tended to highlight their anxiety about union organization.⁹ Accordingly, it is held that the presence of the principals tended to interfere with, restrain, or coerce the teachers in the exercise of their rights to form, join, or assist a labor organization.

The Superintendent's Statement

The final issue is whether Respondent violated section 7116(a)(1) of the statute when the Superintendent of Fort Bragg Schools made a statement to a group of employee teachers.

On May 14, 1979, the North Carolina Association of Educators ("NCAE") held a meeting at the Irwin School for the purpose of enlightening the teachers at Fort Bragg about collective bargaining. The speaker was a representative from the state office of NCAE. The meeting was attended by about 50 or 60 teachers and the Superintendent of the Fort Bragg Schools, Dr. Haywood Davis.

⁸ In an analogous case it was held that management cannot interrogate an employee concerning the names and number of employees who had signed a representation petition. Federal Energy Administration, Region IV, Atlanta, Georgia, A/SLMR No. 541, 5 A/SLMR 509 (1975).

⁹ Respondent argues that the principals had a right to attend the meetings since they were on federal property. However, management authorized the use of certain rooms for the meetings and there is no evidence that any appropriate function of management was served by the attendance of principals.

At one point during the question and answer period after the lecture, the speaker was in the process of explaining the process by which the teachers could obtain collective bargaining. He noted that it would be necessary for a certain number of teachers to request it. At this point Superintendent Davis walked up to the podium and made a statement to the audience. The intent and effect of Davis' statement was to discourage the teachers from filing a petition with the Authority for collective bargaining. He told the teachers that although he supported the right of any teacher to join any labor organization, he did not want to see collective bargaining in his school system because it would put administrators and teachers "on opposite sides of the table." He prefaced his remarks by acknowledging that it might be improper for him to make such a statement, but that he wished all of his teachers were there to hear it.¹⁰

The General Counsel and the Charging Party both argue that the above statement violated 5 U.S.C. § 7116(a)(1) because it interferes with, restrained, or coerced the employee teachers in the exercise of their rights under the statute. Section 7102 gives each employee the right to form, join, or assist any labor organization freely and without fear of penalty or reprisal. This right specifically includes the right to engage in collective bargaining with respect to conditions of employment through chosen representatives. 5 U.S.C. § 7102(2). The Superintendent's statement at the May 14 meeting clearly interfered with and restrained the Fort Bragg teachers from exercising their protected right to engage in collective bargaining. The charging party, AFT, only a few days earlier, had conducted several meetings with the teachers to explain collective bargaining and solicit membership. Davis' statement had the effect of discouraging this effort. Moreover, Davis' remarks were particularly coercive since he was in charge of the entire Fort Bragg school system, including the discipline and annual rehiring of the teachers. It is irrelevant that Davis did not specifically threaten the employees with reprisal if they did not act in accordance with his wishes.¹¹

Accordingly, it is held that Respondent violated section 7116(a)(1) of the statute.

¹⁰ Findings with respect to Davis' statement are based on the credible testimony of three teachers; I do not credit Davis' testimony that he was merely trying to say that it is possible to have exclusive representation without collective bargaining.

¹¹ A contrary result may have been obtained under one unenacted bill which provided that the expression of any personal views would not constitute an unfair labor practice if it did not contain a "threat of reprisal or force or promise of benefit or undue coercive conditions." S. 2640, 95th Cong., 2d Sess., § 7216(g). This subsection was ultimately modified to provide for limited freedom of expression in three instances not applicable herein. 5 U.S.C. § 7116(e).

* * *

The wearing of union insignia generally may not be prohibited unless there is a legitimate business reason such as it interferes with work or creates a safety hazard. The activity did not violate Section 7116(a)(1) of the Statute when it prohibited two hotel service employees from wearing union stewards' badges while dealing with the public, particularly in view of the size and conspicuous nature of the badges, where (1) restriction is pursuant to and consistent with activity's long-standing policy of enforcing its prescribed uniform requirement, (2) there is no evidence of a discriminatory purpose, and (3) uniformed employees are allowed to wear union stewards' badges when they are not serving the public. United States Army Support Command, Fort Shafter, Hawaii and Service Employees International Union, Local 556, AFL-CIO, 3 FLRA 795 (1980). See also DOJ v. FLRA, 955 F.2d 998 (5th Cir. 1992) (INS policy banning on-duty employees from wearing union pins on their uniforms did not violate CSRA or First Amendment).

**AIR FORCE PLANT REPRESENTATIVE OFFICE
and NFFE**

5 FLRA 492 (1981)

(Extract)

. . . Upon consideration of the entire record in the subject cases, including the Regional Director's Report and Findings on Objections in Case No. 6-RO-7 and the parties' stipulation and respective briefs in Case No. 6-CA-233, the Authority finds:

In May 1979, the National Federation of Federal Employees, Local 1958 (NFFE) filed a petition seeking to represent a unit consisting of all the Activity's General Schedule professional and nonprofessional employees, excluding employees engaged in Federal personnel work in other than a purely clerical capacity, management officials and supervisors as defined in the Federal Service Labor-Management Relations Statute (5 U.S.C. §§ 7101-7135). The American Federation of Government Employees, AFL-CIO, Local 1361 (AFGE) became an Intervenor in that proceeding. In June 1979, the parties entered into an approved Agreement for Consent or Directed Election pursuant to which a representation election was scheduled to be conducted on July 12, 1979.

A few days before the election, on or about July 10, 1979, the Activity published a newsletter entitled "Talley-Ho ! Gram," dated July 10, 1979 signed by the Activity's chief management official. The newsletter was published in the Activity's eleven divisions by being posted on bulletin

board located approximately 90 feet from the voting booth in the prospective election and in a direction from which the majority of the employees would pass on their way to vote. The "Talley-Ho ! Gram," which remained posted on the bulletin boards through July 12, 1979, the date of the election, stated as follows:

10 July 1979
POST ON ALL BULLETIN BOARDS

1. NOTICES HAVE BEEN POSTED AND DISTRIBUTED ON THE UNION ELECTION TO BE HELD THURSDAY, 12 JULY, BETWEEN 1345 AND 1545. EMPLOYEES ON THE PAYROLL AS OF CLOSE OF BUSINESS 2 JUNE 1979 WILL BE ELIGIBLE TO CAST THEIR VOTE FOR:

* NO UNION
* AFGE
* NFFE

YOUR DECISION WILL BE BINDING OVER THE YEARS TO COME SHOULD YOU VOTE FOR A UNION TO REPRESENT YOU.

2. YOU ALL HAVE REPRESENTATIVES IN CONGRESS. A 15 CENT STAMP WILL ALLOW YOU TO COMMUNICATE WITH THEM. WHEN WRITING TO YOUR CONGRESSMAN, I SUGGEST ONLY ONE TOPIC OR SUBJECT TO A LETTER.
3. THE UPCOMING ELECTION WILL BE MONITORED BY THE FEDERAL LABOR RELATIONS AUTHORITY. ALL PARTIES CONCERNED WILL HAVE AN OBSERVER PRESENT AT THE VOTING LOCATION (MIC). VOTES WILL BE TALLIED BY THE OBSERVER AND CERTIFIED TO BY THE FEDERAL LABOR RELATIONS AUTHORITY.
4. BETWEEN NOW AND THURSDAY AFGE AND NFFE WILL HAVE REPRESENTATIVES IN THE AFPRO BETWEEN 1100 AND 1300. VIRGINIA SCHMIDT, CPR, HAS SENT OUT NOTICES CITING WHERE THESE REPRESENTATIVES WILL MEET WITH EMPLOYEES. BE CANDID WITH THESE REPRESENTATIVES. ASK THEM WHAT THEY CAN DO FOR YOU THAT YOUR CONGRESSMAN CANNOT DO. I HAVE TALKED TO EACH REPRESENTATIVE. - NOW IT IS YOUR TURN. VOTE ACCORDINGLY.

DORSEY J. TALLEY, COLONEL, USAF
COMMANDER

In the secret ballot election conducted on July 12, 1980, a majority of the valid votes counted (50 of 90 nonprofessionals and 10 of 18 professionals) were cast against exclusive recognition.

AFGE thereafter filed timely objections to conduct alleged to have improperly affected the results of the election (Case No. 6-RO-7), contending that the contents of the "Talley-Ho ! Gram" posted by the Activity a few days before the election interfered with the free choice of eligible voters in the election. Additionally, AFGE later filed an unfair labor practice charge alleging that, by such conduct, the Activity also violated section 7116(a)(1) of the Statute (Case No. 6-CA-233).¹

In Case No. 6-RO-7, the Regional Director issued his Report and Findings on Objections in which he found, based upon an investigation and the positions of the parties, that no question of fact existed with regard to the content of the Activity's newsletter and that portions of the newsletter violated the Activity's duty of neutrality and/or contained misrepresentations of fact. More specifically, the Regional Director found that the last sentence of item 1 in the "Talley-Ho ! Gram," i.e., "Your decision will be binding over the years to come should you vote for a union to represent you," was factually incorrect and violated the statutory requirement of agency neutrality by clearly implying the employees would be "burdened with the union for many years if they voted for exclusive recognition. He further found that item 4 of the "Tally-Ho ! Gram," which advises employees to question both labor organizations on the ballot regarding what union representation could do for them that their Congressman could not do, clearly implied that the unit employees did not need a union at all and therefore constituted a violation of agency neutrality. In so finding, the Regional Director rejected the Activity's contention that the message contained in the newsletter was factual and neutral and was an expression protected by section 7116(e) of the Statute.* Accordingly, he concluded that improper conduct occurred which affected the results of the election and required the election to be set aside and rerun as soon as possible after resolution of the issues in the related unfair labor practice case (6-CA-233). The Activity thereafter filed a request for review seeking reversal of the Regional Director's Report

¹ On March 27, 1980, the General Counsel issued a Complaint and Notice of Hearing in 6-CA-233 based upon AFGE's unfair labor practice charge. Thereafter, on July 28, 1980, pursuant to the terms of a stipulation reached by the parties therein and section 2429.1 of the Authority's rules, the Regional Director ordered the case transferred directly to the Authority for decision.

* Some footnotes deleted.

and Findings on Objections, contending that the "Talley-Ho ! Gram" did not violate agency neutrality and, in any event, was an expression protected by section 7116(e) of the Statute.

In Case No. 6-CA-233, the Activity essentially restated the foregoing arguments in its brief to the Authority, arguing that the issues in both cases were the same. AFGE and the General Counsel, in their respective briefs, contended in effect that the statements contained in the "Talley-Ho ! Gram" were not an expression of "personal views" but contained an implied anti-union attitude on the part of management and therefore were unprotected by section 7116(e) of the Statute.

As previously stated, the questions before the Authority are (1) whether certain statements contained in the "Talley-Ho ! Gram" constitute sufficient basis for setting aside the election in Case No. 6-RO-7, and (2) whether such statements further constitute a violation of section 7116(a)(1) of the Statute as alleged in Case No. 6-CA-233. For the reasons set forth below, the Authority concludes that both questions must be answered in the affirmative.

Section 7116(e) of the Statute, as finally enacted and signed into law, incorporates a number of amendments which were added by the Senate-House Conference Committee to the provision contained in the bill passed by the Senate. The Joint Explanatory Statement of the Committee on Conference indicates the following with respect thereto:

EXPRESSION OF PERSONAL VIEWS

Senate section 7216(g) states that the expression of

* * * any personal views, argument, opinion, or the making of any statement shall not constitute an unfair labor practice or invalidate an election if the expression contains no threat of reprisal or force or promise of benefit or undue coercive conditions.

The House bill contains no comparable provision.

The House recedes to the Senate with an amendment specifying in greater detail the types of statements that may be made under this section. The provision authorizes statements encouraging employees to vote in elections, to correct the record where false or misleading statements are made, or to convey the Government's view on labor-management relations. The wording of the conference report is intended to reflect the current policy of the Civil Service Commission when advising

agencies on what statements they may make during an election, and to codify case law under Executive Order 11491, as amended, on the use of statements in any unfair labor practice proceeding. [Emphasis added.]

Thus, section 7116(e) provides that:

The expression of any personal view, argument, opinion . . . shall not, if the expression contains no threat of reprisal or force or promise of benefit or was not made under coercive conditions . . . constitute an unfair labor practice. . . .

As to representation elections, section 7116(e) provides that:

[T]he making of any statement which--

- (1) publicizes the fact of a representational election and encourages employees to exercise their right to vote in such election,
- (2) corrects the record with respect to any false or misleading statement made by any person, or
- (3) informs employees of the Government's policy relating to labor-management relations and representation,

shall not, if the expression contains no threat of reprisal or force or promise of benefit or was not made under coercive conditions . . . constitute an unfair labor practice . . . or . . . constitute grounds for the setting aside of any election. . . .

Accordingly, while section 7216(g) of the Senate bill permitted the expressing of personal view during an election campaign, section 7116(e) of the Statute specifies those statements which are authorized--i.e., statements encouraging employees to vote in elections, correcting the record where false or misleading statements are made, or conveying the Government's views on labor-management relations.

While Executive Order 11491, as amended, did not contain a specific provision such as section 7116(e) of the Statute, a policy was established thereunder that agency management was required to maintain a posture of neutrality in any representation election campaign.⁵

⁵ See, e.g., Charleston Naval Shipyard, A/SLMR No. 1, 1 A/SLMR 27 (1970), at n.17; and Antilles Consolidated Schools, Roosevelt Roads, Ceiba, Puerto Rico, A/SLMR No. 349, 4 A/SLMR 114

Where management deviated from its required posture of neutrality and thereby interfered with the free and untrammeled expression of the employees' choice in the election, such election would be set aside and a new election ordered.⁶ Moreover, management's breach of neutrality during an election campaign was also found to violate section 19(a)(1) of Executive Order 11491, as amended,⁷ by interfering with, restraining and coercing employees in the exercise of their protected rights to determine whether to choose or reject union representation.⁸ We now turn to the application of the foregoing policy and case law to the facts and circumstances of the subject cases, in accordance with the stated intent of Congress in enacting section 7116(e) of the Statute (*supra* n.2).

In Case No. 6-RO-7, as previously stated, the Regional Director found that portions of the "Talley-Ho! Gram," as posted on the Activity's bulletin boards and distributed to the employees shortly before the election, violated the requirements of neutrality and/or contained misrepresentations of fact which required the election to be set aside. The Authority concludes, in agreement with the Regional Director, that those statements in the "Talley-Ho ! Gram" to the effect that the employees' "decision will be binding over the years to come should you vote for a union to represent you" and urging the employees to "[a]sk [the unions] what they can do for you that your Congressman cannot do" violated the requirements of management neutrality during an election campaign. Such statements clearly could be interpreted by the unit employees as implying that they did not need and would not benefit from union representation, and would be unable to rid themselves of union representation for years to come if they were to vote in favor of exclusive recognition in the forthcoming election. In the Authority's view, such statements interfered with the employee's freedom of choice in the election and therefore the election to be set aside.

In so concluding, the Authority rejects the Activity's contention that the foregoing statements contained in the "Talley-Ho ! Gram" were protected by section 7116(e) of the Statute. At the outset, the Authority

(1974). See also Robert E. Hampton, Chairman, United States Civil Service Commission, "Federal Labor-Management Relations: A Program in Evolution," 21 Catholic University Law Review 493, 502 (1972).

⁶ See, e.g., Antilles Consolidated Schools, 4 A/SLMR 114, *supra* n.5.

⁷ Section 19(a)(1) provided as follows:

Section 19. Unfair labor practices. Agency management shall not--

(1) interfere with, restrain, or coerce an employee in the exercise of the rights assured by this Order. . . .

⁸ See, e.g., Veterans Administration, Veterans Administration Data Processing Center, Austin, Texas, A/SLMR No. 523, 5 A/SLMR 377 (1975), review denied by the Federal Labor Relations Council, 5 FLRC 75 (1977).

rejects the Activity's assertion that the "Talley-Ho ! Gram" was merely the "expression of [a] personal view, argument, [or] opinion within the meaning of section 7116(e) of the Statute. Rather, where (as here) written statements by the head of an Activity are posted on all bulletin boards and circulated to unit employees, they are not merely the expression of personal views but may reasonably be interpreted as the Activity's official position with regard to the matters addressed in such statements. In addition, as previously stated (*supra* p. 6), section 7116(e) authorizes statements encouraging employees to vote in elections, correcting the record where false or misleading statements are made, or conveying the Government's views on labor-management relations. While the "Talley-Ho ! Gram," in part, publicized the forthcoming representation election and encouraged employees to vote in such election, and to that extent fell within the protection of section 7116(e), other portions of the "Talley-Ho ! Gram" set forth above went beyond the scope of permissible statements thereunder and did not require protected status merely because they were contained in the same document which properly publicized and encouraged employees to vote in the election. Moreover, as found by the Regional Director, "there was no evidence that the publication was intended to correct the record with respect to any false or misleading statements made by the party." Finally, such statements did not "convey the Government's views on labor-management relations." As indicated above, the Government's views are that employees should be free to choose or reject union representation while management maintains a posture of neutrality, and, as further stated by Congress in section 7101 of the Statute, that "labor organizations and collective bargaining are in the public interest."⁹ To the extent that the "Tally-Ho ! Gram" implied that union representation was unnecessary and undesirable, therefore, such statements were directly contrary to the Government's views on labor-management relations.

Turning next to the question raised in Case No. 6-CA-233, the Authority concludes that, in the circumstances presented, the same statements which caused the election to be set aside in Case No. 6-RO-7 also constitute a violation of section 7116(a)(1) of the Statute which provides that "it shall be an unfair labor practice for an agency to interfere with, restrain, or coerce any employee in the exercise by the employee of any right under this chapter." Consistent with the findings and purpose of Congress as set forth in section 7101 (*supra* n.9), section 7102 of the Statute (entitled "Employees' rights") provides in part that "[e]ach employee shall have the right to form, join, or assist any labor organization, or to refrain from any such activity, freely and without fear of penalty or reprisal, and each employee shall be protected in the exercise of such right." Under Executive Order 11491, as amended, which established and protected identical employee rights,¹⁰ management's

breach of neutrality during an election campaign was found to constitute unlawful interference with such protected rights in violation of section 19(a)(1) of the Order (*supra* n. 7).¹¹ Consistent with the stated intent of Congress, the Authority concludes that management's breach of neutrality during an election campaign similarly interferes with the same protected rights of employees under the Statute and therefore violates section 7116(a)(1) of the Statute.

In the instant case, as found above with respect to Case No. 6-RO-7, the Activity breached its obligation to remain neutral during the election campaign by posting on all bulletin boards and distributing to unit employees--shortly before the scheduled election--a message signed by the head of the Activity which strongly implied that unions were unnecessary, undesirable, and difficult to remove once the employees voted in favor of exclusive recognition. Such violation of neutrality interfered with the employees' protected right under section 7102 of the Statute to "form, join, or assist any labor organization, or to refrain from any such activity," and therefore violated section 7116(a)(1) of the Statute in the circumstances of this case.

In view of the foregoing, the Respondent in Case No. 6-CA-233 shall take the action set forth in the following Order; and the election conducted on July 12, 1979, in Case No. 6-RO-7, is hereby set aside and a second election shall be conducted as directed below.

* * *

In light of subsequent cases, Colonel Talley's statements seem less dangerous. In Arizona Air National Guard, Tucson and AFGE, 18 FLRA 583 (1985), the Authority confirmed the propriety of commanders and their staffs speaking out on union representation matters, so long as it is within the bounds of the law. The agency issued a memorandum to all employees containing a series of questions and answers concerning the implications of a pending election. Although the union argued that the memo, "by inference, suggested the negative aspects of unionism and interfered with the employee's freedom of choice in a representation election," the Authority held the agency had not violated § 7116(a)(1). It reasoned that, as the memo was correct as to law and Government policy, and did not promise benefits to or threaten employees, it did not interfere with their freedom of choice.

In IRS, Louisville, 20 FLRA 660 (1985), the Authority found that a supervisor's threat to sue a bargaining unit employee and the union did not constitute an ULP. The libel suit was threatened by the supervisor personally, not the agency, and was in response to the employee's rash allegations made in conjunction with a grievance, not

in retaliation for her filing the grievance. Therefore, there was no violation of § 7116(a)(1), CSRA.

The Authority found that the agency committed an unfair labor practice when an employee was told that there is no union representation on weekends and when the agency imposed overly broad rules prohibiting any union activity on weekends. Naval Air Station Alameda and IAMAW, Lodge 739, 38 FLRA 567 (1990).

What right does a union have to disparage supervisors and managers? In IRS and NTEU, 7 FLRA 596 (1981), the union printed a leaflet in which a supervisor was awarded the "Holiday Turkey" award. It enumerated working practices with which the union was unhappy. The leaflet was distributed at a cafeteria table which was generally used for distribution of union literature. An unfair labor practice was sustained against management when it confiscated the literature. The Authority stated that employees may distribute union literature in nonwork areas during nonworking time, provided there is not a personal attack on management's officers. Epithets such as "scab," "liar," and "unfair" have been an insufficient basis for removal.

Management violates § 7116(a)(1) derivatively whenever it violates any of the other provisions of section 7116. The rationale is that when management violates any of the other ULP provisions it violates the employee's rights as enunciated in section 7102. The authority of the union and its reasons for existence are undermined. See DLA, 5 FLRA 126 (1981).

A supervisor recommended to an employee that she drop a grievance. The supervisor explained that even if she should succeed in having her evaluation changed she would not gain anything in the long run. The Authority adopted the ALJ's finding that this is a coercive or intimidating statement implying adverse consequences and an implied threat, and thus constituted a violation of § 7116(a)(1). Further, the statement was so phrased that it implied that the career of any employee who complained of management action by processing grievances would suffer. United States Dept. of Treasury Bureau of Alcohol, Tobacco and Firearms, Chicago IL, and NTEU Chapter 94, 3 FLRA 723 (1980).

In Navy Resale System Commissary, 5 FLRA 311 (1981), the Authority adopted the ALJ's finding that a statement by an employee's supervisor angrily reminding the employee that he was the boss, that things would go more smoothly if problems were brought to him, and that the union president should be left out of such matters is a violation of § 7116(a)(1) as it is coercive of the statutory right of employees to request their union's representation.

When an Agency's Area Director said he would keep a list of employees who "fought him" by going to a union and there would be adverse consequences for them, the FLRA found the statements to be unlawful. The Authority found the standard to be an objective one, not based on the subjective perception of the employees or the intent

of the supervisor. The issue was whether, under the circumstances, the statement tends to coerce or intimidate the employees, or whether the employees could reasonably have drawn a coercive inference from the statement. EEOC, San Diego and AFGE, 48 FLRA 1098 (1993).

5-3. Discrimination to Encourage or Discourage Union Membership.

Section 7116(a)(2) provides that it is an unfair labor practice for an agency:

to encourage or discourage membership in any labor organization by discrimination in connection with hiring, tenure, promotion, or other conditions of employment; . . .

This ULP often arises when management treats a union representative differently from other employees. The following case demonstrates this.

**INTERNAL REVENUE SERVICE, BOSTON
and NTEU,**

5 FLRA 700 (1981)

(Extract)

* * *

The Judge found that BDO violated section 7116(a)(1) and (2) of the Statute by removing employee James E. Tacy, Revenue Officer, GS-12, from a work detail at the Center at least in part because of Tacy's activities on behalf of the National Treasury Employees Union (NTEU) during his nonduty time while at the Center.³ In so finding, the Judge specifically rejected the contention that termination of the detail was effected solely for business reasons, relying upon BDO's awareness of Tacy's activities on behalf of NTEU, the timing of Tacy's removal from the detail, and "the lack of any credible and persuasive reason for the termination" of the detail. More particularly, the Judge rejected the assertion that Tacy's detail had been rescinded by BDO because GS-12 was too high a grade for the detail as suggested in a memorandum previously submitted by two BDO employees who had been detailed to the Center in the past. In rejecting such assertion, the Judge noted that

³ At all times material herein, the bargaining unit employees at the Center were exclusively represented by the American Federation of Government Employees, AFL-CIO (AFGE), and NTEU was waging an organizational campaign to replace AFGE as the bargaining agent. Bargaining unit employees at BDO are exclusively represented by NTEU.

the 1979 IRS Manual Supplement, which provides a basis for reconstituting the detail, imposed no grade level restriction on the detail; that the employee who ordinarily would have filled the detail also was a GS-12; that BDO management was aware of both Tacy's grade level and the former detailees' memorandum at the time it approved Tacy's request for the detail; that for a period prior to the detail, and thereafter, grade level was not a management consideration; that the termination of Tacy's detail involved considerable difficulty in terms of reassigning work so as to enable another employee to be detailed as a replacement for Tacy; that no other detail had ever been terminated prematurely; and that the timing of management's concern with Tacy's union activities at the Center coincided with the termination of his detail. Accordingly, as previously stated, the Judge concluded that the removal of Tacy from the detail was motivated at least in part by anti-union considerations and was a reprisal for Tacy's activities on behalf of NTEU, in violation of section 7116(a)(1) and (2) of the Statute. However, the Judge further found that the record contains no evidentiary basis for concluding that the Center was in any way responsible for the termination of Tacy's detail; accordingly, he concluded that those portions of the complaint alleging violations against the Center should be dismissed. By way of remedy, the Judge ordered, inter alia, a posting at BDO but not at the Center; the General Counsel's exceptions object, in part, to the absence of a posting requirement at the Center.

The Authority concludes, in agreement with the Judge, that Respondent BDO violated section 7116(a)(1) and (2) of the Statute. The Authority also adopts the Judge's rationale for finding a violation, as set forth, supra. However, unlike the Judge, the Authority finds that the Judge's credibility resolutions lead to the conclusion that the termination of Tacy's detail was based solely upon his protected union activities at the Center since the record establishes that the reason asserted by BDO for taking such action is pretextual.

Having found that BDO violated section 7116(a)(1) and (2) of the Statute, the Authority adopts the Judge's remedial order which requires BDO to cease and desist from such unlawful conduct and to post a notice at the various posts of duty within BDO. Additionally, inasmuch as the unfair labor practice occurred at the Center and thus directly affected the protected rights of employees at that location, the Authority also shall order BDO to post the same notice at the Center in order to fully remedy the unfair labor practice.⁴

⁴ The Authority notes that the General Counsel has not requested an order requiring that Tacy's detail be reinstated. Further, the Authority takes administrative notice of the fact that NTEU was certified on August 12, 1980 as the exclusive representative of Center employees.

The Statute does not offer any protection to employees participating in concerted activities unrelated to membership in, or activities on behalf of, a labor organization. VA, 4 FLRA 76 (1980).

IRS, Washington, D.C. and NTEU, 6 FLRA 96 (1981). The FLRA reversed the ALJ who, in finding a violation of 5 U.S.C. § 7116(a)(1) and (2), held that it is sufficient to establish that the union or protected activity played a part in management's decision not to promote. In cases involving an allegation of discrimination for engaging in protected activity, the test to be applied is as follows:

[T]he burden is on the General Counsel to make a prima facie showing that the employee had engaged in protected activity and that this conduct was a motivating factor in agency management's decision not to promote.

Once this is established, the agency must show by a preponderance of the evidence that it would have reached the same decision as to the promotion even in the absence of the protected conduct.

Finding that the agency established by a preponderance of the evidence that the employee would not have been selected even if she had not engaged in protected activity, the Authority dismissed the complaint. See also SSA, San Francisco and AFGE, 9 FLRA 73 (1982).

5-4. Assistance to Labor Organizations.

Section 7116(a)(3) provides that it is an unfair labor practice for an agency:

to sponsor, control, or otherwise assist any labor organization, other than to furnish, upon request, customary and routine services and facilities if the services and facilities are also furnished on an impartial basis to other labor organizations having equivalent status; . . .

The provision is intended to prevent "company" unions. It is rarely violated. When this ULP is sustained, it is usually because management, either intentionally or inadvertently, has aided one union to the detriment of another.

**UNITED STATES ARMY AIR DEFENSE CENTER
FORT BLISS TEXAS
and NFFE**

29 FLRA 362 (1987)

(Extract)

I. Statement of the Case

This unfair labor practice case is before the Authority on exceptions filed by the Respondent and the National Association of Government Employees, Local R14-89 (NAGE) to the attached decision of the Administrative Law Judge. The General Counsel filed an opposition to the exceptions. The issue is whether the Respondent violated section 7116(a)(2) and (3) of the Federal Service Labor-Management Relations Statute (the Statute) by refusing to provide the Charging Party, National Federation of Federal Employees, Local 2068, Independent (NFFE) with a building for NFFE's use during a representation election campaign. For the reasons stated below, we find, contrary to the Administrative Law Judge, that the Respondent was not required to provide NFFE with a building similar to the one used by NAGE and that the Respondent satisfied the requirements of section 7116(a)(3) of the Statute by offering NFFE the use of customary and routine facilities for use in the campaign.

II. Background

On May 25, 1984, NFFE filed a petition for an election in a bargaining unit of certain employees of the Respondent. At that time, the unit was represented by NAGE. Until on or about October 16, 1984, the Respondent and NAGE were parties to a collective bargaining agreement.

After October 16, 1984, and during the pendency of the representation case, the Respondent and NAGE continued to give effect to their agreement. On February 28, 1985, the Regional Director of the Authority approved an agreement for a consent election. On May 8 and 9, 1985, an election was conducted. The results of that election were inconclusive because neither NAGE nor NFFE received a majority of the valid votes cast in the election. The petition for election is presently pending the outcome of a run-off election to determine the exclusive bargaining representative.

Under the collective bargaining agreement between the Respondent and NAGE, the Respondent agreed to provide a building to NAGE for use as a "Union Hall." The building provided for NAGE's use was a one-story, wooden, barracks-type building in the middle of a heavily

populated part of the Base. Beginning on or about April 17, 1985, NFFE representatives observed NAGE using the building in connection with its election campaign efforts. In that regard, about 2 weeks before the election, a large banner which read "VOTE NAGE" was placed on the side of the building.

The matter of NAGE's use of the building for campaign purposes was initially raised by NFFE at the consent election meeting in February 1985. Subsequently, and prior to the election, NFFE asked the Respondent to provide it with a building for its campaign. NFFE also asked the Respondent to stop NAGE from using the building in question for campaign activities. The Respondent denied both requests. The Respondent advised NFFE that NAGE had obtained the use of the building through negotiations and that the building was provided by the collective bargaining agreement. The Respondent maintained that it could not restrict NAGE's use of the building for campaign purposes. Additionally, the Respondent advised NFFE that it would not provide NFFE with a building because a building "is not in keeping with what the Statute defines as customary and routine services and facilities." The Respondent did, however, offer NFFE the use of various meeting facilities, including a theater and conference rooms, to use in its campaign effort. NFFE did not avail itself of the offered facilities. NFFE rented an office off Base for its campaign headquarters.

III. Administrative Law Judge's Decision

The Judge concluded that the Respondent violated section 7116(a)(1) and (3) of the Statute when it refused to provide NFFE with a building to use during the election campaign. In reaching that conclusion, the Judge found that NFFE acquired "equivalent status" within the meaning of section 7116(a)(3) of the Statute when it filed its representation petition and, therefore, that it was entitled to the same "customary and routine services and facilities" the Respondent had furnished NAGE. The Judge noted that the legislative history of section 7116(a)(3) described as an example of customary and routine services and facilities, "providing equal bulletin board space to two labor organizations which will be on the ballot in an exclusive representation election." He concluded that if both unions would be equally entitled to bulletin board space, they were both equally entitled to a building for campaign purposes. The Judge reasoned that the Respondent's contract obligation to provide NAGE with a building was in accordance with its section 7116(a)(3) permission to provide customary and routine services and facilities and that 7116(a)(3) required that NFFE receive the same facilities and services.

The Judge concluded that the Respondent's refusal to provide NFFE with a building violated section 7116(a)(1) and (3) of the Statute. Further in that regard, the Judge rejected the Respondent's contention that the Authority's Regional Office was responsible for any violation because the Region was responsible for supervising the election.

IV. Positions of the Parties

In its exceptions, the Respondent essentially contends that an agency does not have a duty under section 7116(a)(3) of the Statute to provide an equivalent status union the same facilities that an incumbent exclusive representative has acquired through collective bargaining. The Respondent maintains that its obligation was only to provide "customary and routine" facilities. The Respondent argues that the building in dispute in this case was obtained by NAGE through negotiation as the exclusive representative and was provided for under the collective bargaining agreement between itself and NAGE. The Respondent argues that it did not provide NFFE with a building because it did not consider a building a "customary and routine" facility under section 7116(a)(3). The Respondent further contends that it offered NFFE the use of numerous meeting places, but that NFFE never availed itself of any of the offered facilities.

In its exceptions, NAGE also contends that its use of a building as a union hall was obtained through negotiations and maintains that there is no basis in section 7116(a)(3) for giving an intervenor the same rights that an incumbent exclusive representative has gained through bargaining. NAGE also argues that NFFE was not disadvantaged in this case because the Respondent gave or offered NFFE extensive access to various facilities on the Base and that NFFE had vans with campaign signs displayed riding around the Base 8 to 10 hours a day.

In its exceptions, the General Counsel contends that the Judge correctly found that the Respondent violated the Statute.

V. Discussion

The significant part of the complaint in this case is that the Respondent committed an unfair labor practice by failing to (1) provide NFFE with a building similar to the one used by NAGE or (2) to stop NAGE from using its building for other than representational purposes. The Judge decided this narrow issue, as do we. We find, contrary to the Judge and the General Counsel, that the Respondent did not violate section 7116(a)(1) and (3) of the Statute as alleged in the complaint.

Section 7116(a)(3) provides that an agency may, upon request, furnish a labor organization with customary and routine services and facilities if the services and facilities are also furnished on an impartial basis to other labor organizations having equivalent status. Thus, under section 7116(a)(3), if an agency grants a union's request for customary and routine services or facilities in a representation proceeding, the agency must, upon request, provide such services or facilities to another union having equivalent status.

We agree with the Judge that NFFE had equivalent status with NAGE in the representation proceeding. However, NAGE did not request and the Respondent did not grant NAGE the use of a building as a "customary and routine" facility during that proceeding. Rather, the Respondent provided NAGE with the building through the give and take of negotiations with NAGE as the exclusive representative of the unit involved before NFFE filed its representation petition. NAGE's right to use the building as a "Union Hall" was expressly established in NAGE's collective bargaining agreement with the Respondent before NFFE became a union "having equivalent status."

We can find no compelling indication in the plain language or legislative history of section 7116(a)(3) that an agency is required to furnish a labor organization that has achieved equivalent status with an incumbent union in a representation proceeding with the exact same services and facilities that the incumbent obtained through collective bargaining before the proceeding. On the contrary, it is reasonable to expect that an incumbent labor organization will have acquired some advantages in agency services and facilities over a rival union through collective bargaining. The Statute does not require that an agency equalize their positions upon request of the rival.

The example from the legislative history of section 7116(a)(3) cited by the Judge does not compel a different conclusion. That example, "providing equal bulletin board space to two labor organizations which will be on the ballot in an exclusive representation election[.]" was used to illustrate the kind of customary and routine services and facilities an agency may furnish "when the services and facilities are furnished, if requested, on an impartial basis to organizations having equivalent status[.]" H.R. Rep. No. 95-1403, 95th Cong., 2d Sess. 49 (1978), reprinted in Committee on Post Office and Civil Service, House of Representatives, 96th Cong., 1st Sess., Legislative History of the Federal Service Labor-Management Relations Statute, Title VII of the Civil Service Reform Act of 1978, Committee Print No. 96-7, at 695 (1979).

We do not believe that a building is the kind of "customary and routine" facility contemplated by Congress in fashioning section 7116(a)(3). But even assuming that a barracks-type building is a customary and routine facility at Fort Bliss, we reemphasize that NAGE did not request and the Respondent did not gratuitously provide NAGE with the building in question during the representation proceeding. NAGE's right to sue the building was established by the previously negotiated agreement. Therefore, the Respondent was under no duty to grant NFFE's request for a similar building. Additionally, we note that the Respondent specifically advised NFFE that it was prepared to provide, upon request, NFFE and NAGE with various meeting facilities for use in their election campaigns.

Accordingly, we conclude that the Respondent did not violate section 7116(a)(1) and (3) of the Statute as alleged in the complaint.

Unions continue to frequently allege violations of the neutrality doctrine as ULP's under § 7116(a)(3). See Fort Sill, Oklahoma, 29 FLRA 1110 (1987); Barksdale Air Force Base and NFFE, 45 FLRA 659 (1992).

5-5. To Discriminate Against an Employee Because of His Filing a Complaint or Giving Information.

Section 7116(a)(4) provides that it is an unfair labor practice for an agency:

to discipline or otherwise discriminate against an employee because the employee has filed a complaint, affidavit, or petition, or has given any information or testimony under this chapter; . . .

In Naval Air Station Alameda and IAMAW, Lodge 739, 38 FLRA 567 (1990), the Authority found an unfair labor practice where an employee was disciplined shortly after a ULP was filed.

5-6. Refusal to Bargain.

Under Section 7116(a)(5), it is an unfair labor practice for an agency:

"to refuse to consult or negotiate in good faith with a labor organization as required by this chapter; . . .

This is the most violated ULP. Usually it is because management did not realize it had a duty to negotiate, or refused to concede that the exclusive representative could usurp what the commander/manager felt was his traditional decision-making powers as a commander/manager.

**FEDERAL AVIATION ADMINISTRATION NORTHWEST
MOUNTAIN REGION and
NATIONAL AIR TRAFFIC CONTROLLERS ASSOCIATION
51 FLRA 35 (1995)**

(Extract)

I. Statement of the Case

The Administrative Law Judge issued the attached decision, finding that the Respondent violated section 7116(a)(1) and (5) of the Federal Service Labor-Management Relations Statute (the Statute) by selecting and installing certain interior design features at the Denver International Airport's Terminal Radar Approach Control (TRACON) and Tower facilities without providing the Union notice or the opportunity to bargain over the substance, impact or implementation of the matters insofar as they constituted changes in bargaining unit employees' conditions of employment.

The General Counsel filed exceptions to the Judge's recommended remedy. The Respondent did not file an opposition to the General Counsel's exceptions.

Upon consideration of the Judge's decision and the entire record, we adopt the Judge's findings, conclusions, and recommended Order.

II. Judge's Decision and Recommended Order

The facts are fully set forth in the Judge's decision and are only briefly summarized here. The Judge concluded that the Respondent violated the Statute by not providing the Union appropriate notice and an opportunity to bargain over the selection and installation of certain interior design features of the TRACON and Tower facilities. The Judge rejected the General Counsel's request for a status quo ante remedy, which would require the Respondent to remove the various design features and bargain over the selection and installation of those items. In so doing, the Judge relied on testimony of Union representative Gary Molen who, according to the Judge, "described the new building as 'very pretty, beautiful.'" Judge's Decision at 4. The Judge ordered the Respondent to bargain over the selection and installation of the design features and to do

so "without regard to the present conditions." *Id.* at 5. As the Judge explained this remedy, "if the collective bargaining process results in an agreement on selections that are different from the existing ones, they should be installed upon request." *Id.*

III. Positions of the Parties

The General Counsel argues that the Judge erred by failing to apply the standard set forth in Department of Health and Human Services, Region IV, Office of Civil Rights, Atlanta, Georgia, 46 FLRA 396 (1992), to remedy the unfair labor practice. According to the General Counsel, that standard requires "that any appropriate bargaining remedy must place the parties on equal footing." Exceptions at 5. The General Counsel asserts that in order to guarantee the Union's right to bargain without regard to the present conditions at the TRACON and Tower facilities, the Authority should order the Respondent not to present before the Federal Mediation and Conciliation Service (FMCS) any proposal related to design features currently in place. The General Counsel also asks the Authority to order the Federal Service Impasses Panel (Panel) to disregard any of the Respondent's proposals related to existing design features as well as any aesthetics and economic waste arguments and to accept "any and all of NATCA's proposals" without regard to current conditions. *Id.* at 8. Finally, the General Counsel requests the Authority to attach strict time frames to the bargaining order to produce a negotiated agreement prior to the projected opening of the new airport.

* * *

IV. Analysis and Conclusions

We agree with the Judge that, to remedy the violation, the Respondent should be required to bargain, at the request of the Union, and, if requested and necessary to implement the results of any agreement reached, to replace the existing design features.¹ Essentially, this constitutes a retroactive bargaining order, a remedy that is within the Authority's broad remedial discretion. See generally National Treasury Employees Union v. FLRA, 910 F.2d 964 (D.C. Cir. 1990) (en banc). This remedy is appropriate where a respondent's unlawful conduct has deprived the exclusive representative of an opportunity to bargain in a timely manner over negotiable conditions of employment affecting bargaining unit employees. U.S. Department of Energy, Western Area

¹ Generally, when management changes a condition of employment without fulfilling its obligation to bargain over the decision to make the change, the Authority orders a status quo ante remedy, in the absence of special circumstances. For example, Federal Deposit Insurance Corporation, 41 FLRA 272, 279 (1991) enforced, 977 F.2d 1493 (D.C. Cir. 1992). However, in this case the Judge did not recommend a status quo remedy and there are no exceptions to that determination.

Power Administration, Golden, Colorado, 22 FLRA 758 (1986), *rev'd on other grounds*, 880 F.2d 1163 (10th Cir. 1989). In this case, the bargaining order recommended by the Judge will effectuate the purposes and policies of the Statute by ensuring the substitution of any design features negotiated by the parties or imposed by the Panel, thereby approximating the situation that would have existed had the Respondent fulfilled its statutory obligations.

We reject the General Counsel's request that the Authority limit the arguments the Respondent may make during the collective bargaining process, including during any mediation efforts by the FMCS. We leave it to the parties to bargain in good faith to the fullest extent consonant with law and regulation. Any assertion that either party failed to meet its duty to bargain would be appropriately raised at the compliance stage of this proceeding.

We also reject the General Counsel's request for additional modifications to the remedy. With regard to the request for the imposition of time limits on the various stages of bargaining, we note that the TRACON and Tower are now open and, therefore, that the expressed reason for the General Counsel's request no longer exists. We also note the difficulty in imposing effective time limits on collective bargaining in the Federal sector. Cf. U.S. Department of Transportation and Federal Aviation Administration, 48 FLRA 1211, 1215 (1993), *petition for review denied*, No. 94-1136 (D.C. Cir. Apr. 5, 1995) (negotiability disputes and impasse resolution proceedings could significantly lengthen any imposed time limits on bargaining). In addition, there is nothing in this record to indicate that the Respondent is unwilling to bargain expeditiously. With regard to the General Counsel's request that we direct the Panel to disregard the Respondent's arguments regarding aesthetic and economic waste and all of its proposals related to the design features currently in place, such direction would intrude on the Panel's discretion under section 7119(c)(5)(B)(iii) of the Statute to take whatever action is necessary and not inconsistent with the Statute to resolve impasses. See National Treasury Employees Union, Chapter 83 and Department of the Treasury, Internal Revenue Service, 35 FLRA 398, 415 (1990).²

V. Order

² Because the Judge's use of Molen's statement is not relevant to our decision in this case, we deny the General Counsel's request that we "find as a matter of fact that Molen's description 'very pretty, beautiful' applied to his impression of the size of the TRACON, not the interior design features of both the TRACON and the Tower." Exceptions at 5.

Pursuant to section 2423.29 of the Authority's Regulations and section 7118 of the Statute, the Federal Aviation Administration, Northwest Mountain Region, Renton, Washington, shall:

1. Cease and desist from:

(a) Unilaterally changing working conditions of unit employees in the bargaining unit represented by the National Air Traffic Controllers Association (NATCA), including the selection and installation of carpeting, carpet tile, wall finishes, and related design features at the Denver International Airport's TRACON and Tower facilities, without first notifying NATCA and affording it the opportunity to bargain to the extent consonant with law and regulation.

(b) In any like or related manner, interfering with, restraining or coercing its employees in the exercise of their rights assured by the Federal Service Labor-Management Relations Statute.

2. Take the following affirmative action in order to effectuate the purposes and policies of the Statute:

(a) Upon request of NATCA, bargain to the extent consonant with law and regulation concerning the selection and installation of carpeting, carpet tile, wall finishes, and related design features at the Denver International Airport's TRACON and Tower facilities, and, if requested and necessary to implement the results of any agreement reached, replace existing design features.

(b) Post at its TRACON and Tower facilities, copies of the attached Notice on forms to be furnished by the Federal Labor Relations Authority. Upon receipt of such forms, they shall be signed by the Air Traffic Division Manager, Northwest Mountain Region, and shall be posted and maintained for 60 consecutive days thereafter, in conspicuous places, including all bulletin boards and other places where notices to employees are customarily posted. Reasonable steps shall be taken to ensure that such Notices are not altered, defaced, or covered by any other material.

(c) Pursuant to section 2423.30 of the Authority's Regulations, notify the Regional director, Denver Regional Office, Federal Labor Relations Authority, in writing, within 30 days from the date of this Order as to what steps have been taken to comply.

Recall that notice or opportunity to bargain must be given to the union if the change to be instituted has more than de minimis impact on the bargaining unit employees. SSA and AFGE, 19 FLRA 827 (1985). In VA Medical Center, Prescott and AFGE, 46 FLRA 471 (1992), the Authority found that changing the schedule of two housekeeping aids had more than a de minimis impact. The Authority looked at the impact fo the decision on the employees and found that employee's concerns about child care and family obligations created an impact that was more than de minimis.

The activity violated sections 7116(a)(1) and (5) of the Statute when it unilaterally changed the existing time frame for processing cases within its Estate and Gift Tax Group without giving prior notice to the union and affording it an opportunity to consult or negotiate concerning impact and implementation of the change when the change had a substantial impact on the employees' working conditions. The fact that the completion dates were easily changed and that none of the attorneys were subjected to meetings with the Chief of the Branch is of no import as the absence of enforcement bears solely on the remedy and not on the change. Department of Treasury IRS, Jacksonville District and NTEU, 3 FLRA 630 (1980).

The Past Practices Doctrine.

Often a local employment-related practice is established informally (known as a "past practice") and a management action changes the past practice without affording the union an opportunity to negotiate

Negotiations. This doctrine requires local management to negotiate within the recognized scope of bargaining on changes in informally established personnel policies, practices and working conditions which may be (1) covered by ambiguous language in the contract; or (2) not covered at all by the contract. The obligation to bargain on such changes is enforceable as an unfair labor practice under §§ 7116(a)(1) and (5). Thus, where local management wants to change an established personnel practice, it must offer to negotiate with the union. The extent of negotiation required varies according to the following:

If the change by management concerns matters that are mandatorily negotiable, management must negotiate to the full extent of its discretion, whether to have the change and how to make the change.

If the change sought by management is an attempt to enforce management rights that have been afforded employees which were optionally negotiable, management must also negotiate fully but only as to the impact and implementation of the change but need not negotiate the decision whether to continue the practice.

If the change by management is in response to a requirement of law or an assertion of prohibited negotiable rights (for which there is no authority to allow the

concession), management should revoke the illegal practice immediately, giving notice concurrently to the union that it stands ready to negotiate the impact and implementation which local management can control. See Navy and AFGE, 34 FLRA 635, (1990).

The doctrine does not apply to negotiations:

if there is no exclusive representative; or

if there is a specific CBA provision which gives management the right to the unilateral change. See Border Parol, El Paso ad AFGE, 48 FLRA 61 (1993); or

where the subject is not negotiable.

The past practices doctrine does not render permissive nor prohibited matters negotiable. Further, negotiation is required only to the extent that the change is controlled by local management. But management's decision to adopt a higher headquarter's policy or regulation, which changes a past practice, triggers the obligation to notify the union. See DODDS and OEA, 50 FLRA 197, 206 (1995)(DODDS decision to implement the revised DOD JTR triggered requirement to notify union).

The Authority found that the agency violated §§ 7116(a)(1) and (5) when it unilaterally eliminated an established past practice by issuing an instruction stating that leave without pay (LWOP) will not be granted to employees who had reached the maximum allowable earnings for a pay period, and then failing to bargain in good faith over this change and its impact on unit employees. The Authority found that a past practice of granting LWOP at the discretion of supervisors existed and rejected the agency's argument that it was effectively discontinued. Whatever attempt made by the activity to end the practice was not communicated to the union, nor was it ever made clear to management's own supervisors. Portsmouth Naval Shipyard, 5 FLRA 352 (1981).

Annual picnic and post exchange privileges as past practices. See AG Publications Center, 24 FLRA 695 (1986); AFGE v. FLRA, 866 F.2d. 1443 (D.C. Cir. 1989).

The FLRA has ruled that a past practice is irrelevant when it does not affect bargaining unit employees or is within management's exclusive authority. AFGE Local 2761 v. FLRA, 866 F.2d 1443 (1989).

The duty to bargain also includes an obligation to provide information under 5 U.S.C. § 7114((b)(4)).

DOD v. FLRA,
114 S.Ct. 1006 (1994).
(Summary)

Analysis of this issue involves a number of statutes. The Federal Service Labor-Management Relations Statute provides that information may only be released to the union if release is not otherwise prohibited by law. 5 U.S.C. § 7114(B)(4). The Privacy Act prohibits release of information in systems of records, such as civilian personnel records, unless an exception applies. 5 U.S.C. § 552a(b). The only applicable exceptions are where a published routine use allows release, or where the Freedom of Information Act (FOIA) requires release. 5 U.S.C. § 552a(b)(3), 5 U.S.C. § 552a(b)(2).

(The Office of Personnel Management has published a routine use that allows the release of names and home addresses to unions where the unions do not have any other way to reach employees. Guidance for Agencies in Disclosing Information to Labor Organizations Certified as Exclusive Representatives Under 5 U.S.C. Chapter 71, FPM Letter 711-164 (September 17, 1992); List of OPM Privacy Act Systems of Records, Federal Register, August 10, 1992. Here the union has access to the employees at work so the routine use does not apply.)

The Privacy Act allows release of information if the FOIA requires release. 5 U.S.C. § 552a(b)(2). FOIA, however, never requires release if, balancing the personal interest in privacy against the public interest in ensuring that government activities are open to public scrutiny, the release would result in a "clearly unwarranted invasion of personal privacy." 5 U.S.C. § 552(b)(6). When the Supreme Court affirmed that the public interest in union activity was not a public interest in relation to the FOIA, there remained no public interest to weigh against the private interest in privacy.

Release of this information, absent consent by the subject of the record or a valid Privacy Act exemption, is a violation of the Privacy Act.

FAA, New York Tracon, Westbury, NY and
National Air Traffic Controllers Assoc.,

51 FLRA No. 12 (1995)(Tracon II)

The Union alleged that the FAA violated section 7116(a)(1), (5) and (8) of the Statute by refusing to provide the Union with a copy of an EEO settlement agreement requested under section 7114(b)(4) of the Statute. The Authority found that the FAA did not violate the Statute because disclosure of the requested information was prohibited by the Privacy Act.

In arriving at this result, the Authority applied the framework announced in FAA, New York TRACON, 50 FLRA 338 (1995)(Yes it was the same agency and union).

In New York TRACON, the union requested unsanitized copies of all bargaining unit employee performance appraisals. When the agency refused to provide the information, the union filed an unfair labor practice charge. The Administrative Law Judge ruled against the agency and the agency filed exceptions to the decision with the FLRA. While the case was pending before the FLRA, the Supreme Court decided DOD v. FLRA. The FLRA adopted the Supreme Court's holding in DOD v. FLRA.

The framework announced by the FLRA is the same as that used in determining the release of information under the Freedom of Information Act (FOIA). The agency seeking to withhold information in reliance on the Privacy Act "bears the burden of demonstrating:

- (1) that the information requested is contained in a system of records under the Privacy Act;
- (2) that disclosure of the information would implicate employee privacy interests; and
- (3) the nature and significance of those privacy interests."

If the agency makes the required showing, the burden shifts to the General Counsel of the FLRA (on behalf of the union) to:

- "(1) identify a public interest that is cognizable under the FOIA; and
- (2) demonstrate how disclosure of the requested information will serve the public interest."

Once the respective interests are identified, the FLRA then balances the respective interests to determine releasability.

In New York TRACON, the FLRA began by reciting the federal labor union's statutory right to information contained in the FSLMRS and the "to the extent not prohibited by law" limitation it contains. The FLRA determined that this limitation brings requests for information under the FSLMRS within the protections of the Privacy Act. In past decisions, the FLRA used the statutory right to information contained in the FSLMRS to find a public interest that justifies releasing information. As a result of the Supreme Court's decision in DOD v. FLRA, the FLRA no longer considers this statutory right to information in determining the applicable public interest to be weighed against the individual's privacy concern. Rather, the FLRA only considers how the information sheds light on the agency's performance of its statutory duties or informs the public about what the Government is doing.

Two other interests used by the FLRA in past cases to tip the balance in favor of disclosure of information were rejected in this case. The FLRA no longer considers the early resolution of grievances in defining the public interest. Early resolution of

grievances does not shed light on how the agency functions. Similarly, the FLRA no longer considers "the proper administration of a collective bargaining agreement" as a public interest to be used in the balancing process, absent a showing that the disclosure would permit an assessment of how the agency administers its labor contract. Taking these statutory weights out of the balancing process makes it much more difficult for unions to overcome the employee's privacy interests.

The FLRA rejected the argument that the Supreme Court's decision in DOD v. FLRA was limited to requests for names and home addresses. The FLRA could find no basis for defining public interest differently in cases involving other kinds of information requested by a union. Under the FSLMRS, unions have a variety of statutory rights and responsibilities. These interests are unique to the union and the FLRA will not consider them in assessing public interest under the Privacy Act.

Applying the new framework to the requested information in New York TRACON, the FLRA found a significant privacy interest in information that reveals how a supervisor assesses an employee's work performance. Favorable information in an employee evaluation report, if released, might embarrass an employee or incite jealousy among co-workers. Releasing unfavorable information in an employee evaluation report, if released, could lead to embarrassment and injury to the reputation of the employees concerned. In New York TRACON, the FLRA balanced this privacy interest in an employee's appraisal against the public interest in knowing that the agency was carrying out its personnel functions fairly and in accordance with the law. After balancing the private and public interests, the FLRA found the public interest in release was outweighed by the substantial invasion of employee privacy.

In Tracon II, the Authority found a public interest in knowing how an agency dealt with discrimination complaints. However, this public interest was insufficient to overcome the privacy interest of the employee. The Authority also noted that a redacted document would not protect the privacy interests of the employee since the settlement applied to one employee and was requested by the employee's name.

NOTE: The FLRA has consistently upheld the agencies' refusal to release unredacted copies of documents to unions since FAA, New York Tracon was decided. However, that does not relieve the obligation to provide documents with the private information redacted, where redaction will protect the privacy interests.

Refusal to honor an agreement is also an unfair labor practice.

Agency's refusal to honor "the unambiguous terms of the settlement agreement by which it was bound . . . constituted repudiation and, as such,

violated section 7116(a)(1) and (5) of the Statute." DODDS and OEA, 50 FLRA 424 (1995).

5-7. Failure to Cooperate in Impasse Procedures.

It is an unfair labor practice for an agency to:

Section 7116(a)(6) to fail or refuse to cooperate in impasse procedures and impasse decisions as required by this chapter; . . .

**U.S. ARMY AEROMEDICAL CENTER FORT RUCKER, & HQ, U.S.
ARMY HEALTH SERVICES COMMAND FORT SAM HOUSTON, and
AFGE LOCAL 1815**

49 F.L.R.A. 361 (1994)

(Extract)

I. Statement of the Case

This unfair labor practice case is before the Authority on exceptions to the attached decision of the Administrative Law Judge.

The complaint alleged that the U.S. Army Aeromedical Center, Fort Rucker, Alabama (Respondent Fort Rucker) violated section 7116(a)(1) and (5) of the Federal Service Labor-Management Relations Statute (the Statute) by engaging in a course of conduct that constituted bad faith bargaining concerning the Charging Party's efforts to bargain over on-call procedures and its attempts to invoke the services of the Federal Service Impasses Panel (the Panel). The complaint further alleged that the Headquarters, U.S. Army Health Services Command, Fort Sam Houston, Texas (Respondent Fort Sam Houston) violated section 7116(a)(1) and (6) of the Statute by refusing to approve, and declaring nonnegotiable, provisions that the Panel ordered Respondent Fort Rucker to adopt.¹ The Respondents did not file an answer to the complaint within 20 days after it was served on them, as prescribed in section 2423.13(a) of the Authority's Rules and Regulations. When no answer was filed, the General Counsel filed a motion for summary judgment under section 2423.13(b) of the

¹ The Panel issued its decision in 91 FSIP 115 (May 30, 1991), directing the parties to adopt the Union's proposal regarding procedures to be followed by employees who are on call. The proposal is set forth in an Appendix to this decision.

Rules and Regulations.² In their response to the General Counsel's motion, the Respondents included an answer to the complaint, in which they admitted the factual allegations of the complaint and denied the legal allegations.

The Judge granted the motion for summary judgment as to Respondent Fort Rucker. The Judge found that there was no good cause for the Respondents' failure to timely file an answer to the complaint. Therefore, in accordance with section 2423.13(b) of the Rules and Regulations, the Judge found that the failure to timely answer the complaint constituted an admission that Fort Rucker had violated section 7116(a)(1) and (5) of the Statute. No exceptions were filed to this portion of the Judge's decision.

The Judge denied the motion for summary judgment as to Respondent Fort Sam Houston on the basis that summary judgment was inappropriate in the circumstances of this case. The Judge also recommended that the portion of the complaint alleging a violation of the Statute by Respondent Fort Sam Houston be dismissed. The General Counsel filed exceptions to the Judge's findings and conclusions with respect to Respondent Fort Sam Houston.

Pursuant to section 2423.29 of the Authority's Rules and Regulations and section 7118 of the Statute, we have reviewed the Judge's decision and find that no prejudicial error was committed. Upon consideration of the Judge's decision and the entire record, and noting that no exceptions were filed in this regard, we adopt the Judge's findings and conclusion that Respondent Fort Rucker violated section 7116(a)(1) and (5) of the Statute. We further adopt the Judge's denial of the motion for summary judgment with respect to Respondent Fort Sam Houston and we agree, for the reasons set forth below, that the complaint against Respondent Fort Sam Houston must be dismissed.

In denying the motion for summary judgment, the Judge found that the failure to timely answer the complaint did not establish that Respondent Fort Sam Houston violated section 7116(a)(1) and (6) of the Statute. The Judge reasoned that, absent a determination by the Authority that the matter was negotiable, Respondent Fort Sam Houston "retained the right to contest the negotiability of the proposal ordered adopted by the [Panel]." Judge's decision at 7. The Judge noted that the

² Section 2423.13(b) of the Rules and Regulations provides, in relevant part:

Failure to file an answer or to plead specifically to or explain any allegation [of the complaint] shall constitute an admission of such allegation and shall be so found by the Authority, unless good cause to the contrary is shown.

complaint did not allege that there had been a prior negotiability determination on the same or substantially similar provision or that the Panel had "treated the negotiability of the Union's proposal." *Id.* at 8. According to the Judge, in these circumstances, a finding of negotiability is necessary in order to sustain a violation of the Statute, and, therefore, "admission of the factual allegations set forth in the Complaint does not support a legal conclusion that the Union's proposal was negotiable." *Id.*

The General Counsel excepts to the partial denial of the motion for summary judgment and the dismissal of the complaint against Respondent Fort Sam Houston. The General Counsel asserts that under section 2423.13(b)(2) of the Authority's Rules and Regulations, the failure to respond to the complaint constituted an admission of the allegations contained therein and the Authority is required to find the violations, as alleged, unless good cause to the contrary is shown. The General Counsel contends that because the Judge found that the Respondents' failure to timely answer the complaint was not for good cause, all the facts of the complaint, including the allegation concerning Respondent Fort Sam Houston, were deemed admitted as true. Therefore, the General Counsel asserts that it is entitled to summary judgment as a matter of law.

The General Counsel further maintains that the Judge incorrectly applied Authority precedent in concluding that a finding of negotiability was required before a violation of section 7116(a)(1) and (6) could be found. Rather, the General Counsel argues that in cases in which there has been no prior negotiability finding by the Authority, it is the responsibility of the Judge to make the necessary negotiability determination. In this regard, the General Counsel asserts that the Judge erroneously "appears to conclude[] that the complaint did not allege sufficient facts to show that the provision in question . . . was negotiable." Exceptions at 7. In the General Counsel's view, "the admitted facts and pleadings are sufficient, as a matter of law, to support the alleged violation of the Statute." *Id.* at 9.

The General Counsel also objects to what it views as the Judge's implication that the General Counsel should have specifically alleged that the Panel-imposed provision was negotiable. According to the General Counsel, the Judge was required to make a negotiability determination and the burden was on the Respondents to show that the Panel-imposed provision was nonnegotiable. However, even assuming that it bore the burden of proving the proposal's negotiability, the General Counsel claims that the admitted facts, as well as the Panel's decision and Authority case law, clearly establish that the proposal is negotiable.

Alternatively, the General Counsel argues that if the Authority concludes that the pleadings are insufficient to support the conclusion that

the Panel-imposed provision was negotiable, the Judge erred in dismissing the complaint against Fort Sam Houston. According to the General Counsel, the Judge should have "remand[ed] the complaint to the Atlanta Region for a trial on the facts[.]" *Id.* at 3.

Initially, we find, contrary to the General Counsel's assertions, that the Judge correctly concluded that the Respondents' failure to timely answer the complaint is insufficient to support a conclusion that Respondent Fort Sam Houston violated section 7116(a)(1) and (6) of the Statute. As the Judge noted, the General Counsel did not allege in its complaint that the provision was negotiable or that the Authority previously had found a substantially similar provision negotiable. Therefore, the Respondents' failure to timely answer the complaint does not constitute an admission that the provision is, in fact, negotiable. Absent such an admission, a finding by the Authority that the Panel-imposed provision is negotiable is a prerequisite to a finding that Respondent Fort Sam Houston violated the Statute by disapproving the provision.

In this connection, the Authority previously has stated that the mere act of reviewing provisions imposed by the Panel does not constitute a violation of the Statute. See U.S. Department of the Army, Headquarters, and DARCOM HQ, 17 FLRA 84 (1985), *aff'd in relevant part sub nom. National Federation of Federal Employees v. FLRA*, 789 F.2d 944 (D.C. Cir. 1986). Rather, as relevant here, an agency commits an unfair labor practice by disapproving a provision imposed by the Panel that is not materially different from one previously found negotiable by the Authority or that the Authority finds, in either an unfair labor practice or a negotiability proceeding, is not contrary to the Statute or any other law, rule, or regulation. See U.S. Department of Health and Human Services, Public Health Service and Centers for Disease Control, National Institute for Occupational Safety and Health, Appalachian Laboratory for Occupational Safety and Health, 39 FLRA 1306, 1311 (1991); Department of the Treasury and Internal Revenue Service, 22 FLRA 821, 828 (1986). The General Counsel concedes that it "did not present [the Judge] with a case in which the Authority had already deemed a proposal negotiable." Exceptions at 7. Absent such a finding, it would be incorrect to conclude that Respondent Fort Sam Houston's conduct in disapproving the Panel-imposed provision violated section 7116(a)(1) and (6) of the Statute.

We also reject the General Counsel's assertions with respect to which party bears the burden of establishing the negotiability of the provision. In order for the Authority to determine that the provision is negotiable and, therefore, that Respondent Fort Sam Houston violated section 7116(a)(1) and (6) of the Statute, the General Counsel was required to allege and demonstrate that the matter was negotiable. As we

noted, the General Counsel did not allege, let alone establish, that the provision is negotiable. As a result, the General Counsel has not met its burden of proof solely as a result of the Respondents' untimely answer to the complaint.

However, we agree with the General Counsel that the Judge erred in dismissing the complaint with respect to Respondent Fort Sam Houston, absent a finding that the Panel-imposed provision is nonnegotiable and, therefore, was properly disapproved. In other words, our conclusion that the General Counsel was not entitled to summary judgment as to this allegation of the complaint does not resolve the underlying issue of whether, in disapproving the Panel-imposed provision, Respondent Fort Sam Houston violated section 7116(a)(1) and (6) of the Statute. As noted, such a finding is contingent on whether the provision is negotiable.

Both the General Counsel, in its exceptions, and Respondent Fort Sam Houston, in its response to the motion for summary judgment, maintain that the Authority should remand this case for a determination as to the negotiability of the provision. Such a remand would be appropriate if the record contained insufficient evidence on which to resolve the issue. However, we find that the record provides a sufficient basis on which to assess the negotiability of the provision. In their pleadings filed with the Authority, as well as the supporting documentation, the parties presented sufficient arguments with respect to the merits of the provision to enable the Authority to resolve the matter. Consequently, in light of the Authority's role in resolving negotiability disputes, set forth in section 7105(a)(2)(E) of the Statute and the cases cited above, and in order to provide an expeditious resolution of this case, we will now address the negotiability of the Panel-imposed provision in order to determine whether Respondent Fort Sam Houston's conduct in disapproving the provision violated section 7116(a)(1) and (6) of the Statute.

The provision, fully set forth in the Appendix, relates to civilian nurses who work in an operating room and who are on call to return to duty. Among other things, the provision prescribes the length of time that these employees have to return to work. Specifically, the employees are provided 25 minutes to prepare themselves to start their drive to work and a reasonable amount of driving time to arrive at their duty location. The provision also states that the employees will not be required to meet stricter standards than those contained in the provision. For the following reasons, we conclude that the provision is nonnegotiable because it would excessively interfere with the right to assign work under section 7106(a)(2)(B) of the Statute.

The Authority previously has held that proposals or provisions that determine when work will be performed directly interfere with the right to assign work. See, for example, American Federation of Government Employees, AFL-CIO, Local 3769 and U.S. Department of Agriculture, Federal Grain Inspection Service, League City Field Office, Texas, 45 FLRA 92, 94-95 (1992) (portion of proposal guaranteeing 10 consecutive hours off duty between certain work assignments found to directly interfere with management's right to determine when certain work assignments would occur). See also National Association of Government Employees, Local R12-33 and U.S. Department of the Navy, Pacific Missile Test Center, Point Mugu, California, 40 FLRA 479, 486 (1991) (elimination of overlap between shifts found to directly interfere with the right to assign work by preventing the agency from determining when the duties of the shift would be performed). The provision here would impermissibly affect management's ability to determine when work will be performed by preventing management from calling the nurses back to duty in a lesser period of time than allowed by the provision. For example, if there were an emergency situation necessitating the nurses' presence in the operating room, management would not be able to require the nurses to reduce their preparation time in order to arrive at work to perform their assigned duties. Accordingly, the provision directly interferes with the right to assign work.

The provision may nonetheless be negotiable if it constitutes an appropriate arrangement under section 7106(b)(3) of the Statute. In National Association of Government Employees, Local R14-87 and Kansas Army National Guard, 21 FLRA 24, 31-33 (1986) (KANG), the Authority established an analytical framework for determining whether a proposal constitutes an appropriate arrangement. First, we determine whether the proposal constitutes an arrangement for employees adversely affected by the exercise of a management right. To do this, we ascertain whether the proposal in question seeks to address, compensate for, or prevent adverse effects on employees produced by the exercise of management's rights. See National Treasury Employees Union, Chapter 243 and U.S. Department of Commerce, Patent and Trademark Office, 49 FLRA No. 24 (1994) (Member Armendariz, concurring in part and dissenting in relevant part). Second, if we conclude that the proposal is an arrangement, we then determine whether the proposal is appropriate, or inappropriate because it excessively interferes with the exercise of a management right. We make this determination by weighing "the competing practical needs of employees and managers" to ascertain whether the benefit to employees flowing from the proposal outweighs the proposal's burden on the exercise of the management right or rights involved. KANG, 21 FLRA at 31-32.

Even assuming that the provision constitutes an arrangement for adversely affected employees, we find that the provision is nonnegotiable because it would excessively interfere with management's right to assign work. In reaching this result, we note that the provision would benefit employees by providing them a sufficient amount of time in which to make whatever adjustments are necessary to their schedules before reporting back to work. The provision would also provide employees with a reasonable driving time beyond that which the employees would have for preparation purposes. We view such benefits as significant. At the same time, however, the provision mandates that the employees can never be held to stricter requirements than the allowance of 25 minutes preparation time followed by a reasonable driving time. The provision thus contains an absolute prohibition against the assignment of duties in any lesser period of time than is authorized under the provision. As we stated above, the employees involved here are operating room nurses who may be called upon to respond to emergency situations. Management's inability to require the nurses to comply with a shorter response time would, in our view, seriously impair management's ability to meet patient care needs and provide quality medical care. On balance, therefore, we conclude that the provision would excessively interfere with management's right to assign work under section 7106(a)(2)(B) of the Statute.

Insofar as the provision excessively interferes with the exercise of a management right, we find that Respondent Fort Sam Houston properly disapproved the provision. Consequently, its conduct in disapproving the Panel-imposed provision did not violate section 7116(a)(1) and (6) of the Statute. See Department of Defense Dependents Schools (Alexandria, Virginia), 33 FLRA 659, 662-64 (1988) (agency's disapproval of provision pertaining to academic freedom did not violate the Statute because the provision was inconsistent with section 7106(a)(2)(A) and (B) of the Statute). Accordingly, we will dismiss the allegations of the complaint with respect to Respondent Fort Sam Houston.

Finally, we agree with the Judge that a bargaining order is appropriate to remedy the violation of section 7116(a)(1) and (5) of the Statute by Respondent Fort Rucker for engaging in a course of bad faith bargaining. Such a remedy is also consistent with our view that where a provision is found to be nonnegotiable and properly disapproved by an agency head, the parties are obligated to return to the bargaining table with a sincere resolve to reach agreement. Department of Defense Dependents Schools (Alexandria, Virginia), 27 FLRA 586, 595 (1987), *rev'd and remanded as to other matters sub nom. DODDS v. FLRA*, 852 F.2d 779 (4th Cir. 1988), *decision on remand*, 33 FLRA 659.

* * *

APPENDIX

The employee on call agrees to make himself or herself available for duty at his or her duty station as quickly as possible; however, employees will not be required to meet more stringent requirements than stated below;

- a. Employees will have 25 minutes to prepare themselves to start the drive to their duty location.
 - b. Employees will be allowed a reasonable driving time to their duty location, considering traffic laws and the location of residence or area from which the notification was received. This expected driving time will be communicated in writing to each employee by the Employer at the time they are placed in a position that will require them to be in an on-call status.
-

Agencies must maintain the status quo while an issue is pending before the FSIP. Any failure or refusal to maintain the status quo would, except where inconsistent with the necessary functioning of the agency, be a violation of section 7116(a)(1) (a derivative violation), (5) (avoiding the bargaining obligation), and (6) (failure to cooperate in impasse procedures). BATF and NTEU, 18 FLRA 466 (1985); EEOC and National Council of EEOC Locals #216, 48 FLRA 306 (1993).

5-8. Regulations in Conflict with CBA.

Section 7116a(7) provides that it is an unfair labor practice for an agency:

to enforce any rule or regulation (other than a rule or regulation implementing section 2302 of this title) which is in conflict with any applicable collective bargaining agreement if the agreement was in effect before the date the rule or regulation was prescribed.

DEPARTMENT OF THE TREASURY and NTEU

9 FLRA 983 (1982)

(Extract)

The first issue before the Authority concerns the negotiability of those portions of Article 2 sections 1A and B, Article 32 section 10A and Article 40 section 3 which establish that whenever provisions contained in

the negotiated agreement conflict with Government-wide or agency-wide rules or regulations issued after the date the agreement became effective, the agreement provisions will prevail. The Authority, in agreement with the Union, concludes that these provisions are consistent with the language of the Statute and its legislative history. In this regard, section 7116(a) provides, in relevant part, as follows:

§ 7116. Unfair labor practices

(a) For the purpose of this chapter, it shall be an unfair labor practice for an agency--

* * *

(7) to enforce any rule or regulation (other than a rule or regulation implementing section 2302 of this title) which is in conflict with any applicable collective bargaining agreement if the agreement was in effect before the date the rule or regulation was prescribed. . . .

The conference committee report concerning this section stated as follows:⁶

The conference report authorizes, as in the Senate bill, the issuance of government-wide rules or regulations which may restrict the scope of collective bargaining which might otherwise be permissible under the provisions of this title. As in the House, however, the Act generally prohibits such government-wide rule or regulation from nullifying the effect of an existing collective bargaining agreement. The exception to this is the issuance of rules or regulations implementing section 2302. Rules or regulations issued under section 2302 may have the effect of requiring negotiation of a revision of the terms of a collective bargaining agreement to the extent that the new rule or regulation increases the protection of the rights of employees.

Consequently, while the duty to bargain under section 7117 of the Statute⁷ does not extend to matters which are inconsistent with existing

⁶ H. Rep. No. 95-1717, 95th Cong., 2d Sess. 155 (1978).

⁷ Section 7117 of the Statute provides, in pertinent part, as follows:

§ 7117. Duty to bargain in good faith; compelling need; duty to consult

(a)(1) Subject to paragraph (2) of this subsection, the duty to bargain in good faith shall, to the extent not inconsistent with any Federal law or any Government-wide rule or regulation, extend to matters which are the subject of any rule or regulation only if the rule or regulation is not a Government-wide rule or regulation.

Government-wide rules or regulations or agency-wide rules or regulations for which a compelling need is found to exist, once a collective bargaining agreement becomes effective, subsequently issued rules or regulations, with the exception of Government-wide rules or regulations issued under 5 U.S.C. § 2302 (relating to prohibited personnel practices), cannot nullify the terms of such a collective bargaining agreement. Thus, the provisions here in dispute are within the duty to bargain under the Statute.

* * *

5-9. Catch-all Provision.

Section 7116a(8) provides that it is an unfair labor for an agency:

to otherwise fail or refuse to comply with any provision of this chapter.

**DEPARTMENT OF DEFENSE
DEFENSE CRIMINAL INVESTIGATIVE SERVICE
and AFGE, LOCAL 2567**

28 FLRA 1145 (1987)

(Extract)

I. Statement of the Case

This unfair labor practice case is before the Authority on exceptions to the attached Decision of the Administrative Law Judge filed by the General Counsel. An opposition to the exceptions was filed by the Defense Criminal Investigative Service (DCIS).⁸ The issue is whether the Respondents violated section 7116(a)(1) and (8) of the Federal Service Labor-Management Relations Statute (the Statute) by denying employees their right under section 7114(a)(2)(B) of the Statute to union representation at investigatory examinations. For the reasons discussed below, we find

(2) The duty to bargain in good faith shall, to the extent not inconsistent with Federal law or any Government-wide rule or regulation, extend to matters which are the subject of any agency rule or regulation . . . only if the Authority has determined under subsection (b) of this section that no compelling need (as determined under regulations prescribed by the Authority) exists for the rule or regulation.

⁸ An opposition to the General Counsel's exceptions filed by the Respondents Defense Logistics Agency and Defense Contract Administration Services Region, New York was untimely filed and therefore has not been considered.

that DCIS violated section 7116(a)(1) and (8) of the Statute by interfering with the right of employees to union representation under section 7114(a)(2)(B). We also find that no further violation was committed by DCIS or the other Respondents.

II. Background

The facts are fully set forth in the Judge's Decision. Briefly, they indicate that the American Federation of Government Employees is the exclusive representative of a consolidated unit of employees of the Defense Logistics Agency (DLA). The Defense Contract Administration Services Region, New York (DCASR NY) is a field component of DLA. Within DCASR NY is the Defense Contract Administration Services Management Area, Springfield, New Jersey (DCASMA), at which the Charging Party, AFGE Local 2567, is the local representative. Organizationally, at all times relevant to this case, DLA was "a separate [a]gency of the Department of Defense under the direction of the Assistant Secretary of Defense (Manpower, Reserve Affairs and Logistics)." Post-hearing Brief of DLA and DCASR NY at 17.

DCIS is the criminal investigative component of the Office of Inspector General in the Department of Defense (DOD). Organizationally, DCIS is within the Office of the Assistant Inspector General for Investigations who, together with other Assistant Inspectors General, reports to the Inspector General. The latter, in turn, reports to the Secretary of Defense.

The functions of the Inspector General and DCIS are more fully described by the Judge in his Decision. We note here that DCIS has various responsibilities within DOD, including the authority to investigate alleged criminal incidents involving DLA employees in connection with their official duties. Once DCIS decides to conduct an investigation, no one within DOD may interfere with the investigation except the Secretary of Defense and then only on matters affecting national security.

An incident occurred in January 1985, involving an alleged gun shot at the home of a DCASMA supervisor. The incident was reported to the local police as well as to the Deputy Director of DCASMA. The latter, in turn, notified DCASR NY which then referred the matter to DCIS. As a part of its investigation, DCIS separately interviewed two employees employed at DCASMA. One of the employees was named as a possible suspect by the supervisor at whose home the shooting occurred. The other employee was thought to own a vehicle matching the description of one observed in the vicinity of the supervisor's home. Both employees were interviewed at their place of employment by an investigator from DCIS and a member of

the local police force. The Deputy Director of DCASMA provided a room for the interviews and had the employees summoned to the interview.

Prior to the interview with the first employee, the Deputy Director informed the DCAS investigator that the DLA-AFGE collective bargaining agreement provided that a union representative was entitled to be present during the questioning of an employee, if the employee requested representation and if the employee reasonably believed that the questioning could lead to disciplinary action. The DCIS investigator informed the Deputy Director that DCIS was not bound by the parties' agreement and that the so-called "Weingarten rule" did not apply to DCIS investigations. In each of the interviews, the employees requested and were denied union representation by DCIS and the local police. No request for union representation was made to DCASMA and no one from DCASMA, DCASR NY or DLA was present at either of the interviews.

III. Judge's Decision

The Judge concluded that neither DLA nor DCASR NY violated the Statute as alleged. In reaching that conclusion, he found that if the interviews had been conducted by DLA, DCASR NY, or DCASMA, the employees would have had a right to union representation under section 7114(a)(2)(B) of the Statute and denial of their requests for representation would have violated section 7116(a)(1) and (8). However, the Judge further found that in this case neither DLA nor any of its constituent components questioned or examined the employees.

The Judge also found no violation by DCIS which, with the local police, refused the employees' request for union representation. The Judge found that DCIS was independent of DLA and was not acting as an agent or representative of DLA. The Judge further found that DCIS itself was not obligated to afford the employees union representation under section 7114(a)(2)(B) since DCIS has no collective bargaining relationship with the Union.

In reaching his conclusions, the Judge found it unnecessary to determine whether use of DCIS reports by DLA to justify disciplining employees would have violated the Statute.

IV. Positions of the Parties

The General Counsel filed exceptions to numerous portions of the Judge's Decision including the Judge's finding that it was not necessary to reach any question regarding DCIS reports and their potential uses. The General Counsel argues that DCIS is a "representative of the agency,

within the meaning of section 7114(a)(2)(B) of the Statute. Essentially, the General Counsel's position is that DCIS acted as an agent of DLA in conducting the interviews and, therefore, that both DCIS and DLA violated section 7114(a)(2)(B) of the Statute by failing to afford the employees their right to union representation. To remedy the alleged unlawful conduct, the General Counsel requests that any documents, reports, and references to the interviews be expunged from the official personnel folders of the two employees, and that the Respondents be ordered to refrain from using the information obtained or derived from the interviews in any disciplinary action initiated against either employee subsequent to the date of the interviews.

In its opposition, DCIS argues that the Judge was correct in not making findings regarding the DCIS reports and was also correct in finding that no violation was committed by DLA, DCASR NY, or DCIS. More specifically, as to the reports, DCIS noted that no reports had been provided to DLA concerning the investigation and no disciplinary action had been taken against any employees as a result of the investigation.

V. Analysis

Under section 7114(a)(2)(B) of the Statute, in any examination of a unit employee by a representative of an agency in connection with an investigation, the employee has the right to have a union representative present if the employee reasonably believes that the examination may result in disciplinary action and the employee requests representation. United States Department of Justice, Bureau of Prisons, Metropolitan Correctional Center, New York, New York, 27 FLRA 874 (1987); Department of the Treasury, Internal Revenue Service, Jacksonville District and Department of the Treasury, Internal Revenue Service, Southeast Regional Office of Inspection, 23 FLRA 876 (1986). There is no question here that the employees had a reasonable belief that disciplinary action might result from the examinations and that the employees requested union representation. The Judge noted that the employees were each advised prior to the examination that a criminal investigation was being conducted and that both employees made their requests for union representation to DCIS. The parties disagree, however, as to whether the examinations were conducted by a "representative of the agency" within the meaning of section 7114(a)(2)(B).

As to that point of disagreement, we agree with the Judge's finding that DCIS, which conducted the examination with the local police, was not acting as an agent or representative of DLA. As described above, DCIS and DLA are organizationally separate from each other. DCIS is empowered to conduct criminal investigations within DOD and reports to the Secretary of Defense. However, we find that DCIS, as an organizational

component of the Department of Defense was acting as a "representative of the agency," that is, DOD, within the meaning of section 7114(a)(2)(B). Clearly, DOD is an "agency" within the definition of the term in section 7103(a)(3) of the Statute as the parties have acknowledged in the complain and answers in this case. As the investigative arm of DOD, DCIS was conducting an investigation into alleged criminal activity involving DLA employees. That a criminal investigation may constitute an "examination in connection with an investigation" was recognized by the Authority in the Internal Revenue Service case cited above, and is not in dispute in this case. Accordingly, we find that each of the interviews with the employees constituted an examination in connection with an investigation within the meaning of section 7114(a)(2)(B) of the Statute at which the employees were entitled to union representation, upon request.

We have previously noted that the purpose of Congress in enacting section 7114(a)(2)(B) of the Statute was to create a right to representation in investigatory interviews for Federal employees similar to the right of private sector employees as described by the Supreme Court in NLRB v. J. Weingarten, Inc., 420 U.S. 251 (1975). For example, Bureau of Prisons, 27 FLRA 874, slip op. at 5-6. Under Weingarten, when an employee makes a valid request for union representation in an investigatory interview, the employer must: (1) grant the request, (2) discontinue the interview, or (3) offer the employee the choice between continuing the interview unaccompanied by a union representative or having no interview. Id. at 6.

In this case, although DCIS was not the employing entity of the employees, once it was aware of the employees' statutory right to union representation in the interview, it could not act in such a manner so as to unlawfully interfere with that right.⁹

DCIS was informed by the Deputy Director of DCASMA that the employees were entitled to union representation upon request.¹⁰ When the employees requested representation, DCIS should have (1) granted their request, (2) discontinued the interview, or (3) offered the employees the

⁹ An organizational entity of an agency not in the same "chain of command" as the entity at the level of exclusive recognition violates section 7116 of the Statute by unlawfully interfering with the rights of employees other than its own. See Headquarters, Defense Logistics Agency, Washington, D.C., 22 FLRA 875 (1986).

¹⁰ Although not alleged as a violation of the Statute, we note that the conduct of DCASMA Deputy Director in providing a room and having the employees summoned for the interviews did not constitute a violation in the circumstances presented. As previously stated, no one within DOD may interfere with a DCIS investigation except the Secretary of Defense, and then only in limited circumstances. For DCASMA to have refused to provide a room or to summon the employees for the interviews arguably would have interfered with the investigation.

choice between continuing the interview unaccompanied by a union representative or having no interview.

However, DCIS failed to properly act on the requests and instead denied the requests and continued with the examinations. DCIS therefore interfered with the statutory right of the employees to have union representation at the examinations. Accordingly, we find that DCIS violated section 7116(a)(1) and (8) of the Statute.

As noted above, the General Counsel disagreed with the Judge's finding that it was not necessary to reach any questions regarding reports prepared by DCIS. We find that the matter of DCIS' reports is not properly before us. The complaint in this case contained no allegation that the reports were in any way violative of the Statute. Also, as noted by DCIS, no reports were submitted to DLA following the investigation and no employee was disciplined as a result of the investigation.

To remedy DCIS' violation of the Statute, we shall order that DCIS cease and desist from unlawfully interfering with the statutory rights of employees represented by the Charging Party to union representation at examinations in connection with investigations. We find no basis on which to grant the General Counsel's request that the Respondents be ordered to expunge any documents referring to the examinations from the official personnel folders of the two employees interviewed and to refrain from using information from the interviews in any action initiated against the employees. The record before us does not indicate that any documents were placed in the employees' official personnel folders or that any action was initiated against the employees.

Finally, we believe that it would be appropriate for the Secretary of Defense, the Inspector General, or other officials with administrative responsibility for DCIS, to advise DCIS investigators of the pertinent rights and obligations established by Congress in enacting the Federal Labor-Management Relations Statute. More particularly as to matters raised in this case, DCIS investigators should be advised that they may not engage in conduct which unlawfully interferes with the rights of employees under the Statute.

In Customs Service, 5 FLRA 297 (1981), the Authority adopted the ALJ's finding that the agency violated §§ 7116(a)(1) and (8) by failing to provide an employee an opportunity to be represented by a union representative at an investigatory interview of that employee. Although the representative was afforded full opportunity to assist the employee at the initial interview, in the subsequent taped interview, where the form of the

questions was different from the initial interview, the representative was admonished not to speak out or make statements.

An agency's obligation to deduct dues is based not upon a contractual obligation but rather upon an obligation imposed by the Statute. The failure to comply with this mandatory obligation constitutes a violation of section 7116(a)(8) of the Statute. DLA, 5 FLRA 126 (1981). See AFGE v. FLRA, 835 F.2d 1458, (D.C. Cir. 1987).

Frequently supervisors and employees engage in "robust communication" including heated language. The Federal sector has generally followed the private sector's moderate response to such problems: "The employee's right to engage in concerted activity may permit some leeway for impulsive behavior," e.g., calling a superintendent a "horse's ass" at a grievance hearing. N.L.R.B. v. Thor Power Tool Co., 351 F.2d 584, 586-87 (7th Cir. 1965). Moreover, when there is unplanned, spontaneous physical contact between a supervisor and a union steward during a heated exchange, no ULP lies against management even if the supervisor initiated the assault. DOL and AFGE, 20 FLRA 568 (1985). The use of racial slurs by a union representative has been held to be beyond the protection of "robust debate." AFGE v. FLRA, 878 F.2d 460 (D.C. Cir. 1989).

5-10. Management/Employee Complaints Against Unions.

Department of Army managers rarely file an ULP. Management, in other agencies of the Federal sector, has filed ULP's on a more frequent basis. Regardless, very few cases are reported.

Section 7116(b) provides:

For the purpose of this chapter, it shall be an unfair labor practice for a labor organization--

(1) to interfere with, restrain, or coerce any employee in the exercise by the employee of any right under this chapter;

(2) to cause, or attempt to cause an agency to discriminate against any employee in the exercise by the employee of any right under this chapter;

(3) to coerce, discipline, fine, or attempt to coerce a member of the labor organization as punishment, reprisal, or for the purpose of hindering or impeding the member's work performance or productivity as an employee or the discharge of the member's duties as an employee;

(4) to discriminate against an employee with regard to the terms or conditions of membership in the labor organization on the basis of race,

color, creed, national origin, sex, age, preferential or nonpreferential civil service status, political affiliation, marital status, or handicapping condition;

(5) to refuse to consult or negotiate in good faith with an agency as required by this chapter;

(6) to fail or refuse to cooperate in impasse procedures and impasse decisions as required by this chapter;

(7) (A) to call, or participate in a strike, work stoppage, or slowdown, or picketing of an agency in a labor-management dispute if such picketing interferes with an agency's operations, or

(B) to condone any activity described in subparagraph (A) of this paragraph by failing to take action to prevent or stop such activity; or

(8) to otherwise fail or refuse to comply with any provision of this chapter.

Section 7114 provides:

(a)(1) A labor organization which has been accorded exclusive recognition is the exclusive representative of the employees in the unit it represents and is entitled to act for, and negotiate collective bargaining agreements covering, all employees in the unit. An exclusive representative is responsible for representing the interests of all employees in the unit it represents without discrimination and without regard to labor organization membership.

The following case illustrates the current interpretation of this provision.

NATIONAL TREASURY EMPLOYEES UNION v. FLRA

800 F.2d 1165 (D.C. Cir. 1986)

(Extract)

BORK, Circuit Judge:

The National Treasury Employees Union petitions for review of a decision and order of the Federal Labor Relations Authority and the Authority cross-applies for enforcement of its order. The Authority held that the union committed an unfair labor practice by refusing to provide attorneys to represent employees who were not members of the union on the same basis as it provided attorneys to members. The attorney

representation sought related to a statutory procedure to challenge a removal action and not to a grievance or other procedure growing out of a collective bargaining agreement.

The question before us is whether the distinction between procedures that arise out of the collective bargaining agreement and those that do not is dispositive or irrelevant under the pertinent provision of the Federal Service Labor-Management Relations Statute. The union contends that it is dispositive because the statute enacts the private-sector duty of fair representation, a duty that is limited to those matters as to which the union is the exclusive representation of the employees. Since the NTEU was not the exclusive representative as to the statutory appeal involved here, the duty of fair representation did not attach, and, the union contends, it was free to provide representation to members that it denied to non-members. The Authority, on the other hand, argues that the statute enforces a duty of nondiscrimination broader than that of private-sector fair representation, a duty that extends to all matters related to employment.

The facts being undisputed, we have before us a single, clearly-defined issue of statutory construction. We think the statute does not admit of the Authority's interpretation and therefore reverse.

I.

NTEU is the exclusive representative of all non-professional employees of the regional offices of the Bureau of Alcohol, Tobacco and Firearms, Department of Treasury. In August, 1979, BATF gave notice of its intention to institute an adverse action against Carter Wright, a BATF inspector in Denver, Colorado. The action would, if successful, result in Wright's discharge. Wright, who was not an NTEU member, telephoned Jeanette Green, president of NTEU chapter representing his bargaining unit, and asked whether non-members were eligible to obtain an NTEU attorney. He did not tell green what kind of a case was involved. She replied that it was NTEU's "policy generally not to furnish legal counsel to non-members." Green suggested that Wright call an NTEU staff attorney in Austin, Texas, for more information, but Wright instead telephoned NTEU National Vice-President Robert Tobias in Washington, D.C. They discussed the details of Wright's case, and Tobias said he would consult the union's national president. Wright called back a few days later and Tobias said the president had decided it "wouldn't be advisable" for the union to provide an attorney. He and the president thought Wright's case not a good one. Tobias said they handled cases for union members automatically but that non-members with poor cases did not necessarily receive representation.

Several weeks later the national president of NTEU sent a memorandum to all local chapter presidents stating that NTEU would continue its policy of refusing to supply attorneys to non-members. This policy applied across the board, to procedures related to the collective bargaining agreement as well as to those not so related. This court, as will be seen, has held that the discrimination between members and non-members with respect to procedures of the former type violates the statute.

BATF proceeded against Wright and ordered him removed. Wright hired private counsel, pursued the statutory appeals procedure created by the Civil Service Reform Act, see 5 U.S.C. §§ 7512, 7513, and 7701 (1982), and ultimately prevailed when the Merit System Protection Board overturned the agency's removal decision.

II.

BATF filed an unfair labor practice charge against NTEU and its Denver chapter. FLRA's General Counsel then issued a complaint alleging that the union violated 5 U.S.C. § 7114(a)(1) (1982), a provision of the Federal Service Labor-Management Relations Statute, by following a policy of discrimination between union members and non-members in the provision of attorney representation. The violation of section 7114(a)(1) meant, it was charged, that the union had committed unfair labor practices in violation of section 7116(b)(1) and (8) of the statute.¹¹ The union was also charged with a separate unfair labor practice under section 7116(b)(1) for violating section 7102.¹²

¹¹ The charges under these sections depend upon a finding that § 7114(a)(1) was violated. Section 7116(b)(1) provides that it is an unfair labor practice for a union "to interfere with, restrain, or coerce any employee in the exercise by the employee of any right under this chapter." 5 U.S.C. § 7116(b)(1) (1982). Section 7116(b)(8) makes it an unfair labor practice for a union "to otherwise fail or refuse to comply with any provision of this chapter."

¹² That section provides:

Each employee shall have the right to form, join, or assist any labor organization, or to refrain from any such activity, freely and without fear of penalty or reprisal, and each employee shall be protected in the exercise of such right. Except as otherwise provided under this chapter, such right includes the right—

(1) to act for a labor organization in the capacity of a representative and the right, in that capacity, to present the views of the labor organization to the heads of agencies and other officials of the executive branch of the Government, the Congress, or other appropriate authorities, and

(2) to engage in collective bargaining with respect to conditions of employment through representatives chosen by employees under this chapter.

5 U.S.C. § 7102 (1982).]

The Administrative Law Judge found that both the Denver chapter and the NTEU had committed the unfair labor practices charged. The ALJ assumed without deciding that the NTEU had no duty to represent any employee before the MSPB but held that, if the NTEU provided representation to union members, it must provide equal representation to non-members. See Joint Appendix ("J.A.") at 109.

The Authority held that the Denver chapter violated the statute but adopted the ALJ's other findings, conclusions, and recommendations. J.A. at 103. The NTEU petitioned this court for review and the FLRA cross-applied for enforcement of its order.

III.

The scope of the NTEU's duty depends upon the meaning of the second sentence of section 7114(a)(1) of the statute. That section provides:

A labor organization which as been accorded exclusive recognition is the exclusive representative of the employees in the unit it represents and is entitled to act for, and negotiate collective bargaining agreements covering, all employees in the unit. An exclusive representation is responsible for representing the interests of all employees in the unit it represents without discrimination and without regard to labor organization membership. 5 U.S.C. § 7114(a)(1) (1982).

Each party contends that its position is compelled by the plain language of the second sentence: the union, that the statute embodies only the private-sector duty of fair representation; the Authority, that the statute states a flat duty of nondiscrimination in all matters related to employment. We, on the other hand, find nothing particularly plain or compelling about the text, standing alone.

The statute requires the union to act evenhandedly with respect to the "interests" of employees. Adopting the ALJ's analysis, the FLRA found that Wright had an "interest," within the meaning of section 7114(a)(1)'s second sentence, in pursuing his appeal under the Civil Service Reform Act and so must be furnished counsel by the union for that purpose if the union furnishes counsel for the same purpose to union members. The difficulty with this analysis is that the meaning of "interests" is not given by the statute and is not self-evident. Unless the word is taken to mean all things that employees might like to have--a meaning that neither party attributes to the word--"interests" requires further definition. While deference is owed the Authority's statutory construction, we think the circumstances of this

case--the structure of the statute, and, more particularly, the history against which section 7114(a)(1) was written--establish Congress' intent to enact for the public sector the duty of fair representation that had been implied under the private sector statute and therefore preclude the Authority's interpretation. See Chevron U.S.A. v. Natural Resources Defense Council, 467 U.S. 837, 843 n.9, 104 S. Ct. 2778, 2782 n.9, 81 L.Ed.2d 694 (1984) ("If a court, employing traditional tools of statutory construction, ascertains that Congress had an intention on the precise question at issue, that intention is the law and must be given effect.").

The structure of section 7114(a)(1) supports the union's position--that the "interests" protected are only those created by the collective bargaining agreement and as to which the union is the exclusive representative. Thus, the first sentence establishes the union as the "exclusive representative" and states what the union is entitled to do in that capacity: "act for, and negotiate collective bargaining agreements covering, all employees in the unit." The second sentence of a discrete provision such as this might reasonably be expected to relate to the same subject as the first. A natural, though not necessarily conclusive, inference, therefore, is that the duty of representing all employees relates to the union's role as exclusive representative.

This inference is reinforced by the way the statute deals with representation in procedures of various sorts.

Section 7114(a)(5) provides:

The rights of an exclusive representative under the provisions of this subsection shall not be construed to preclude an employee from--

(A) being represented by an attorney or other representative, of the employee's own choosing in any grievance or appeal action; or

(B) exercising grievance or appellate rights established by law, rule, or regulation;

except in the case of grievance or appeal procedures negotiated under this chapter.

5 U.S.C. § 7114(a)(5) (1982).

The statute itself thus distinguishes between the employees' procedural and representational rights by drawing the line the union urges here, the line between matters arising out of a collective bargaining agreement and other matters. Section 7114(a)(5) does not address the precise question before us but it employs a distinction that is familiar from private sector

cases and thus suggests that section 7114(a)(1) may similarly be drawn from private sector case law with which Congress certainly was familiar.

These observations bear upon a line of argument the FLRA apparently found persuasive. The ALJ, whose rulings were affirmed and whose findings and conclusions were adopted by the Authority, reasoned that the Federal Service Labor-Management Relations Statute imposes a broader duty of fair representation upon unions than courts have implied in the private sector under the National Labor Relations Act.

The doctrine of fair representation developed in the private sector is applicable under the Statute; but with an important and significant difference: § 14(a)(1) specifically provides that "An exclusive representative is responsible for representing the interests of all employees in the unit it represents without discrimination and without regard to labor organization membership". . . . The first sentence of § 9(a) of the National Labor Relations Act, 29 U.S.C. § 159(a), is substantially similar to the first sentence of § 14(a)(1) of the Statute; but the language of the second sentence of § 14(a)(1) . . . is wholly absent in § 9(a) of the NLRA. . . . Consequently, under the Statute that statutory command of § 14(a)(1), i.e., a specific non-discrimination provision, must be enforced, not merely the concept of fair representation developed in the private sector as flowing from the right of exclusive representation. J.A. at 119. This is the only reasoning offered and it is unpersuasive in light of the history of, and the rationale for, the duty of fair representation. The ALJ, and hence the Authority, reason that the private-sector duty of fair representation cannot have been intended because Congress added to this statute a sentence about unions' duties that is not found in the NLRA. The quick answer is that the duty of fair representation was imposed upon the NLRA by courts reasoning from the NLRA's equivalent to the first sentence of section 7114(a)(1). Subsequently, Congress wrote the Federal Service statute and added a second sentence that capsulates the duty the courts had created for the private sector. The inference to be drawn from Congress' use of the language of the judicial rule of fair representation is not that Congress wished to avoid that rule. To the contrary, the inference can hardly be avoided that Congress wished to enact the rule.

The duty of fair representation was first formulated by the Supreme Court in Steele v. Louisville & Nashville R.R., 323 U.S. 192, 65 S. Ct. 226, 89 L.Ed. 173 (1944). The Court found the duty to be inferred from the union's status as exclusive representative of the employees in the bargaining unit. Thus, the Court said, "Congress has seen fit to clothe the bargaining representative with powers comparable to those possessed by a legislative body both to create and restrict the rights of those whom it represents, but it also imposed on the representative a corresponding duty."

Id. at 202, 65 S. Ct. at 232 (citation omitted). The Court stated it was "the aim of Congress to impose on the bargaining representative of a craft or class of employees the duty to exercise fairly the power conferred upon it in behalf of all those for whom it acts, without hostile discrimination against the." Id. at 202-03, 65 S. Ct. at 231-32.

So long as a labor union assumes to act as the statutory representative of a craft, it cannot refuse to perform the duty, which is inseparable from the power of representation conferred upon it, to represent the entire membership of the craft. While the statute does not deny to such a bargaining labor organization the right to determine eligibility to its members, it does require the union, in collective bargaining and in making contracts with the carrier, to represent non-union or minority union members of the craft without hostile discrimination, fairly, impartially, and in good faith. Id. at 204, 65 S. Ct. at 233.

It will be observed that the Court, in the case creating the duty of fair representation, repeatedly rooted the duty in the powers conferred upon the union by statute, the powers belonging to the union as exclusive representative.¹³ The duty was thus co-extensive with the power; the duty is certainly not narrower than the power, and this formulation indicates that it is also not broader.

This view of the duty as arising from the power and hence coterminous with it is expressed again and again in the case law:

Because "[t]he collective bargaining system as encouraged by Congress and administered by the NLRB of necessity subordinates the interests of an individual employee to the collective interests of all employees in a bargaining unit," Vaca v. Sipes, 386 U.S. 171, 182 [87 S. Ct. 903, 912, 17 L.Ed.2d 842] (1967), the controlling statutes have long been interpreted as imposing upon the bargaining agent a responsibility equal in scope to its authority, "the responsibility of fair representation." Humphrey v. Moore, [375 U.S. 335] at 342 [84 S. Ct. 363, 368, 11 L.Ed.2d 370 (1964)]. . . . Since Steel v. Louisville & N.R. Co, 323 U.S. 192 [65 S. Ct. 226, 89 L.Ed. 173] (1944), . . . the duty of fair representation has served as a "bulwark to prevent arbitrary union conduct

¹³ Of course, a minority union has never been held to act under a duty of fair representation. A minority union cannot be recognized as the exclusive bargaining representative without violating the NLRA. See International Ladies' Garment Workers' Union, AFL-CIO v. NLRB, 366 U.S. 731, 81 S. Ct. 1603, 6 L.Ed.2d 762 (1961). This provides additional support for the view that the duty arises from, and its contours are defined by, a union's status as exclusive representative.

against individuals stripped of traditional forms of redress by the provisions of federal labor law." Vaca v. Sipes, supra, 386 U.S. at 182, 87 S. Ct. at 912.

Hines v. Anchor Motor Freight, Inc., 424 U.S. 554, 564, 96 S. Ct. 1048, 1056, 74 L.Ed.2d 231 (1976).¹⁴

If this were a private sector case, it would seem clear that the union has not violated its duty of fair representation because the rationale that gives rise to that duty does not apply here. In the case before us the union's authority as exclusive representative did not strip Wright of redress as an individual. To the contrary, Wright actively pursued his statutory appeal rights and won. He did not do that by the union's suffrage but as a matter of right. Not only was that appeal procedure open to him but the union was forbidden by section 7114(a)(5) from attempting to control it.

The NTEU's position thus runs along the line established by the private-sector case law and suggested by the structure of the relevant statutory provisions. The Authority's position adopts a new line that is not to be found in the case law antedating the statute or in the statute's structure. Counsel for the FLRA was asked at oral argument whether, on the Authority's reasoning, a union that provided probate advice to its members would thereby be obligated to provide the same advice to non-members. Counsel replied that the union would not have that duty, the distinction being that the provision of probate services does not relate directly to the members' or non-members' employment. Of course, the statute does not even imply that distinction, nor does the pre-existing case law.

The ambiguity that will often exist in determining whether a service is or is not directly related to the employment relationship may be a reason to be wary of the Authority's proffered test. It is easier to determine whether the service provided grows out of the collective bargaining relationship. There is, moreover, a clear and articulated policy reason for confining the scope of the union's duty to the scope of its exclusive power: the individual, having been deprived by statute of the right to protect himself must receive in return fair representation by the union. Rights are shifted from the individual to the union and a corresponding duty is imposed upon the union.

No such policy supports the additional line drawn by the Authority. The FLRA's position depends not upon the reciprocal relationship of the union's

¹⁴ See International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America v. NLRB, 587 F.2d 1176, 1181 (D.C. Cir. 1978); 1199 DC, National Union of Hospital and Health Care Employees v. National Union of Hospital and Health Care Employees, 533 F.2d 1205, 1208 (D.C. Cir. 1976); Truck Drivers and Helpers, Local Union 568 v., NLRB, 379 F.2d 137, 141 & n.2 (D.C. Cir. 1967); see generally H. Wellington, Labor and the Legal Process 129-84 (1968). For a recent statement and application of the duty of fair representation, see, e.g., Kolinske v. Lubbers, 712 F.2d 471, 481-82 (D.C. Cir. 1983).

rights and duties but upon a demand for equality of services when the employment relationship is involved. Yet the distinction between services that are employment-related and those that are not seems arbitrary. All services provided by the union are employment-related in the sense that they are provided to employees only. When, as here, the individual retains the right to protect himself in the employment relationship, it is by no means obvious why the union's provision of an attorney to assist in a statutory appear action is more valuable than the union's provision of an attorney to draft a will. Both are services employees will value, both would cost the individual money, so that it is not apparent why it is discrimination to provide one service to union members only but not discrimination to provide the other in that restricted fashion.

Thus, we cannot accept as reasonable the Authority's claim that, in including the second sentence in section 7114(a)(1), Congress intended to impose a duty broader than that implied in the private sector. The Supreme Court in *Steele* and subsequent cases drew from the first sentence of section 9(a) of the NLRA an implication of a duty that is substantially expressed in the second sentence of 5 U.S.C. § 7114(a)(1) (1982), the federal sector provision. The logical, and we think (in light of the history and the rationale for the duty of fair representation) conclusive, inference is that when Congress came to write section 7114(a)(1) it included a first sentence very like the first sentence of section 9(a) and then added a second sentence which summarized the duty the Court had found implicit in the first sentence. In short, Congress adopted for government employee unions the private sector duty of fair representation.

Two additional factors persuade us that this is the correct inference. First, if Congress were changing rather than adopting a well-known body of case law, one would expect mention of that intention somewhere in the legislative history. The Authority has referred us to, and we are aware of, nothing of that sort. Second, if the union's duty had been broadened beyond the scope of its right of exclusive representation, one would expect the range of the new duty to be delineated, or at least suggested, probably by some indication in the statute or its legislative history of what the term "interests" means. It is conceded that the word does not cover everything an employee might like to have, which would mean that the union may not differentiate between members and non-members in any way whatever. But is that is not the case, the statute gives no direction of any sort unless it adopts the private sector equation of the scope of the union's right and its duty.¹⁵

¹⁵ The ALJ found that NTEU's failure to provide Wright with an attorney constitute not only a violation of § 7114(a)(1), but also "an independent violation of section 7116(b)(1) of the Statute by interfering with the employees' protected right under section 7102 of the Statute to refrain from joining a labor organization." J.A. at 103. The Authority appears to have adopted these conclusions: "[T]he Authority

This leaves only the Authority's argument that our decision in NTEU v. FLRA, 721 F.2d 1402 (D.C. Cir. 1983), is "dispositive" of this case. The FLRA contends that we affirmed its decision that "discrimination based on union membership in any representational activity relating to working conditions which an exclusive representative undertakes to provide unit employees is violative of the Statute. . . . At no point did this court in its decision in 721 F.2d 1402 intimate that it was reaching its decision only in connection with discrimination in grievance arbitration or other contractually created proceedings." Brief for the Federal Labor Relations Authority at 17-18 (emphasis in original). It is instructive to compare that representation by counsel for the Authority with the case counsel is discussing.

This court stated the practice under review in 721 F.2d 1402 as follows:

Under a policy adopted and implemented by the Union, only Union members are furnished assistance of counsel, in addition to representation by local chapter officials and Union stewards, with respect to grievances or other matters affecting unit employees in the context of collective bargaining. Non-members, however, are limited to representation by chapter officials and stewards, and are expressly denied the assistance of counsel in matters pertaining to collective bargaining.

721 F.2d at 1403 (emphasis added and omitted).

These discrepant policies framed the issue the court thought it was deciding. The court stated that the duty of fair representation "applies whenever a union is representing bargaining unit employees either in contract negotiations or in enforcement of the resulting collective bargaining agreement." Id. at 1406. This court thus stated the duty of fair representation as the NTEU states it here, not as the Authority states it, as extending to all matters relating to employment.

finds that NTEU has failed and refused to comply with section 7114(a)(1) of the Statute, and therefore has violated section 7116(b)(1) and (8) of the Statute." J.A. at 104.

It follows from our holding that the Union did not violate § 7114(a)(1) that there was no independent violation of § 7102. The latter section provides in pertinent part: "Each employee shall have the right to form, join, or assist any labor organization, or to refrain from any such activity, freely and without fear of penalty or reprisal, and each employee shall be protected in the exercise of such right." 5 U.S.C. § 7102 (1982). Were we to conclude that although a union's provision of counsel to members but not to non-members concerning matters unrelated to the collective bargaining agreement does not violate § 7102. Not even the Authority contends that the statute compels this result. Accordingly, our conclusion that the Union has not violated § 7114(a)(1) requires the same conclusion with respect to § 7102.]

To put a cap on it, the court stated: [T]he Union is incorrect in suggesting that the challenged policy merely reflects an internal Union benefit that is not subject to the duty of fair representation. Attorney representation here pertain directly to enforcement of the fruits of collective bargaining. Therefore, as exclusive bargaining agent, the Union may not provide such a benefit exclusively for Union members.

Id. at 1406-07 (emphasis added).

It is difficult to know what could have prompted counsel to say that the case stands for the proposition that a union may not differentiate between members and non-members as to any representational function and that at no point did the opinion intimate that the decision rested on the fact that the representation related to contractually created proceedings. We would have thought that no one could read the case in that fashion. This court's opinion in 721 F.2d 1402 clearly proceeds on a rationale that supports the position here of the NTEU, not that of the FLRA.¹⁶ So clear is this that, if we had before us only the precedent of that case, and nothing more, we would have difficulty holding for the Authority.

For the foregoing reasons, the Authority's decision is hereby
Reversed.

At least one other Circuit Court of Appeals and the FLRA have agreed with the D.C. Circuit's interpretation. See AFGE v. FLRA, 812 F.2d 1326 (10th Cir. 1987); DODDS, 28 FLRA 908 (1987).

In AFGE, Local 2000, 14 FLRA 617 (1984), the president of a local union stated to the most vocal of the nonmembers that the nonmember was a "troublemaker" and that she would "get" him. The statement constituted a threat and, made in the presence of other nonmembers, also had a chilling effect upon the right of other employees to refrain

¹⁶ The Authority states that its construction of the statute is "fully consistent with private sector precedent" and cites Del Casal v. Eastern Airlines, 634 F.2d 295 (5th Cir.), cert. denied, 454 U.S. 892, 102 S. Ct. 386, 70 L.Ed.2d 206 (1981), and Bowman v. Tennessee Valley Authority, 744 F.2d 1207 (6th Cir. 1984), cert. denied, 470 U.S. 1084, 105 S. Ct. 1843, 85 L.Ed.2d 142 (1985). Brief for the Federal Labor Relations Authority's position at 15 n.10. neither case supports the Authority's position here. Del Casal involved the union's refusal to represent an employee in a grievance procedure governed by the collective bargaining agreement on the ground that he was not a union member. That was held breach of the duty of fair representation. Bowman made a similar holding where the union had negotiated a collective bargaining agreement giving members preferential transfer rights. The court linked the duty of fair representation to the right of exclusive representation. Since both cases involved discrimination against non-members as to matters within the union's role as exclusive representative, neither provides any support for the Authority's position here. If these cases are "fully consistent" with the FLRA's position, that can be so only in the sense that they are not explicitly inconsistent.

from joining or assisting any labor organization "freely and without fear of penalty or reprisal." Accordingly, the union violated § 7116(b)(1).

Federal employees do not have a private right of action against their union's for breach of the duty of fair representation. See Karahalios v. NFFE, 489 U.S. 527 (1989).

Strikes and Picketing

A unanimous panel of the U.S. Court of Appeals for the District of Columbia Circuit held that the FLRA did not abuse its discretion by stripping PATCO of exclusive representation rights for striking the FAA in 1981. It upheld the FLRA finding that PATCO "willfully and intentionally" ignored federal laws prohibiting federal employee strikes. Section 7120(f) of the CSRA says that when the FLRA finds that a union has committed the ULP of striking, it shall revoke the union's status as bargaining representative or "take any other appropriate disciplinary action." This seems to suggest that the FLRA has discretion in strike cases. But presumably such discretion would only be exercised to take action short of decertification if a strike were proved to be a wildcat. See Professional Air Traffic Controllers Organization v. Federal Labor Relations Authority, 685 F.2d 547 (D.C. Cir. 1982).

CSRA § 7116(b) provides: "Nothing in paragraph (7) of this subsection [which prohibits work stoppages/slowdowns] shall result in any informational picketing which does not interfere with an agency's operations being considered as an unfair labor practice." The Department of Army still prohibits picketing on the installation except in "rare instances." See Department of Army message, Subject: Clarification of Department of Army Policy on Informational Picketing, 24 February 1979. The rationale is that picketing always interferes with the mission. The installation, however, must be prepared to articulate how the picketing interferes with the agency mission. Fort Ben Harrison and AFGE, 40 FLRA 558 (1991).

Although Section 7116(b)(7) contains a general prohibition against picketing if it interferes with the agency's mission, Section 7116(b) further provides that

Nothing in paragraph (7) of this subsection shall result in any informational picketing which does not interfere with an agency's operations being considered as an unfair labor practice.

Thus, when an agency (Social Security Administration) filed an ULP charge against a union (AFGE) for picketing the lobby of its building and a complaint issued on the charge, the Authority dismissed the complaint because there was no interference with the agency's operations. Social Security Administration and AFGE, 22 FLRA 63 (1986). Because there were only 11 pickets, the picketing lasted only 10 minutes, and the pickets were silent, there was no disruption of the mission.

CHAPTER 6

GRIEVANCES AND ARBITRATION

6-1. Introduction.

The labor counselor will be involved with grievance resolution and, to a much greater extent, arbitration. The management team will be depending upon the labor counselor to perform in a professional, competent manner. This will require a basic knowledge of the CSRA's provisions and private sector principles, as well as being able to perform as an accomplished advocate.

This chapter will be concerned with analysis of the grievance and arbitration provisions of the CSRA, of pertinent private sector experience and policies, and will provide some practice pointers for the processing of grievances and for case presentations at arbitration.

6-2. The Grievance Procedure Prescribed by the CSRA.

Section 7121* of the CSRA sets forth many statutory requirements concerning the negotiated grievance procedure and prescribes certain features of that procedure. Most prominently, section 7121(a)(1) and (b)(1) together provide that all collective bargaining agreements shall provide procedures for the settlement of grievances, including questions of arbitrability, and that the terminal step of those procedures shall provide for binding arbitration of any grievance not satisfactorily settled. Section 7121(b)(1) further restricts invocation of binding arbitration to either the agency or the exclusive representative; it does not permit arbitration to be invoked by aggrieved employees. Army Armament Research and Development Command, 17 FLRA 615 (1985).

Section 7121(b) prescribes certain other features of the negotiated grievance procedure, such as, that it shall be fair and simple and shall provide for expeditious processing. More importantly, however, in section 7121(b) a balance has been struck between the sometimes competing or conflicting interests of the exclusive representative and the aggrieved employee in the presentation and processing of grievances. Thus, the negotiated grievance procedure must assure an exclusive representative the right, in its own behalf or on behalf of any bargaining-unit employee, to present and process grievances. At the same time, the procedure must assure the

* 5 U.S.C. § 7121 was amended by Pub. L. 103-424, § 9, Oct. 29, 1994, 108 Stat. 4365. The amendments modified and renumbered various provisions in paragraph (b), and added paragraphs (b)(2) and (g).

The complete text of section 7121 is attached as an appendix to this chapter.

employee the right to personally present a grievance without the representation of the exclusive representative although the exclusive representative in such event has the right to be present during the grievance proceeding. What this means is that with respect to the negotiated grievance procedure, an aggrieved employee is precluded from being represented by an attorney or representative other than the exclusive representative because the only circumstances under which the employee may avoid the representation of the exclusive representative in the presentation and processing of a grievance is by the employee presenting the grievance in the employee's own behalf.

The Authority has also held in this area that the "right to be present during the grievance proceeding" in section 7121(b)(1) includes an implied right of the union to be notified when a grievance is filed by an employee on the employee's own behalf and to be timely served on request with copies of all documents relating to the grievance to the extent that such disclosure is consistent with law. Social Security Administration, Office of Hearings and Appeals, 25 FLRA 571 (1987) (to the extent that it is inconsistent, Lowry Air Force Base, 17 FLRA 469 (1985), will no longer be followed). Section 7114(a) also deals with the rights of employees and the exclusive representative in the presentation of grievances.

Section 7121 together with the statutory definition of grievance set forth in section 7103(a)(9) set the framework for the coverage and scope of the negotiated grievance procedure. Under these provisions, the negotiated grievance procedure automatically extends to all matters, except those excluded by law, covered by the statutory definition of grievance unless the parties mutually and specifically agree to exclude any of those matters in their collective bargaining agreement. Section 7103(a)(9) broadly defines grievance as any complaint:

- (A) by any employee concerning any matter relating to the employment of the employee;
- (B) by any labor organization concerning any matter relating to the employment of any employee; or
- (C) by any employee, labor organization, or agency concerning
 - (i) the effect or interpretation, or a claim of breach, of a collective bargaining agreement; or
 - (ii) any claimed violation, misinterpretation, or misapplication of any law, rule, or regulation affecting conditions of employment[.]

In short, all matters that under law could be submitted to the negotiated grievance procedure "shall in fact" (to quote the Conference Report that accompanied the CSRA) be within the coverage of a grievance procedure unless the parties negotiate specific exclusions. These provisions are in significant contrast to private sector labor relations and collective bargaining, particularly the structuring of the subject of coverage that is to

be negotiated. Unlike in the private sector, agencies and unions under the CSRA no longer negotiate matters into coverage by the grievance procedure with all other matters consequently excluded. Instead, the parties will have the broadest procedure allowed by law from which they may mutually choose to negotiate specific matters out of coverage.

Any such negotiated exclusion would then be in addition to the exclusions by law from a negotiated grievance procedure. The CSRA in section 7121(c) specifically excludes from coverage by a negotiated grievance procedure grievances concerning the following five general matters: (1) prohibited political activities; (2) retirement, life insurance, or health insurance; (3) a suspension or removal for national security reasons; (4) any examination, certification, or appointment; and (5) the classification of any position which does not result in the reduction-in-grade or pay of an employee. The statutory exclusion that has resulted in the most decisions of the Authority construing the substance of the exclusion is section 7121(c)(5). In this respect the Authority has specifically advised that when the essential nature of a grievance is integrally related to the accuracy of the classification of the grievant's position, that is, where the substance of the dispute concerns the grade level of the duties assigned and performed by the grievant, the grievance concerns the classification of a position within the meaning of section 7121(c)(5). FAA, 8 FLRA 532 (1982). Similarly, section 5366(b) of the CSRA specifically excludes as a matter of law certain grievances concerning grade and pay retention matters. Specifically, section 5366(b) provides that an action which is the basis of an employee's entitlement to grade and pay retention benefits shall not be grievable under a grievance procedure negotiated under the Statute. Thus, the Authority has expressly recognized that reductions-in-grade made pursuant to position reclassification actions for which grade and pay retention benefits are available are precluded from grievance and arbitration. Social Security Administration, 16 FLRA 866 (1984); VA Medical Center, 16 FLRA 869 (1984).

Authority has issued decisions resolving whether three vigorously disputed matters are within the permissible coverage of a grievance procedure negotiated under the Statute. The three disputed matters are: (1) the separation of a probationary employee (2) the discipline of a National Guard civilian technician; and (3) the discipline of a professional employee of the Department of Medicine and Surgery of the Veterans Administration.

Initially, the Authority uniformly held that grievances over such matters were within the permissible coverage of a grievance procedure negotiated under the Statute; the federal courts uniformly held on review of negotiability and ULP cases that such matters are precluded by law from grievance and arbitration; and the Authority uniformly adopted the rationale and conclusions of the courts in reversing the initial determinations and holding that such matters are precluded by law from grievance and arbitration. The matter that has had the greatest ramifications because it applies to such a large category of federal employees is the matter of the separation of a probationary employee. Specifically, the Authority in a number of arbitration cases

involving grievances over the separation of a probationary employee held that there was nothing in the language of the Statute, nothing in the legislative history to the Statute, and nothing in law and regulation pertaining to the probationary period of employment to indicate that Congress intended to preclude grievance and arbitration over the separation of probationary employees. However, on review of a negotiability decision in Department of Justice, Immigration and Naturalization Service v. FLRA, 709 F.2d 724 (D.C. Cir. 1983), the court held that the statutory and regulatory scheme for a probationary period of employment set forth in 5 U.S.C. § 3321 and 5 C.F.R. part 315 precludes coverage under a negotiated grievance procedure of a grievance concerning the separation of a probationary employee. In a series of arbitration cases, *e.g.*, Department of Labor, 13 FLRA 677 (1984), the Authority consequently has held on the basis of the rationale and conclusion of the court in INS that grievances over the separation of a probationary employee are precluded by law and regulation. Department of Medicine & Survey employees of VA was similar.

A number of federal courts of appeal on review of decisions of the Authority uniformly held contrary to the Authority that the National Guard Technicians Act, 32 U.S.C. § 709, unmistakably forecloses any obligation on the part of the National Guard to arbitrate a grievance over discipline taken under section 709(e) of that Act. *E.g.*, Indiana Air National Guard v. FLRA, 712 F.2d 1187 (7th Cir. 1983). Thus, the Authority consequently held on the basis of the rationale and conclusions of the courts of appeal that grievances concerning an adjutant general's decision to take any of the actions enumerated in section 709(e) of the Technicians Act are precluded by law. *E.g.*, Wisconsin Army National Guard, 14 FLRA 57 (1984).

In a case similar to these, VA Medical Center of Cleveland, 19 FLRA 297 (1985), the Authority held that the coverage by a negotiated grievance procedure of a grievance concerning the separation during the initial year of employment of an employee holding a veterans readjustment appointment is precluded by the statutory and regulatory scheme for these appointments set forth in 38 U.S.C. § 2014 and 5 C.F.R. part 307. In so deciding the Authority found a close alignment between the initial appointment to a competitive service position and the veterans readjustment appointment.

6-3. Grievance resolution under the CSRA.

The CSRA has provided the employee in a bargaining unit a number of means of resolving an employment dispute that may arise. When the employee chooses to resolve that dispute by the filing of a grievance, four general types or categories of disputes can be identified under the terms of section 7121. It is important to examine each type or category because each has its own unique features of processing that must be recognized. The four types of grievance disputes may be categorized as (1) a pure grievance, (2) unacceptable performance and serious adverse action cases under section 4303 and section 7512, (3) a pure discrimination case, and (4) a mixed case under section 7702.

a. Pure Grievance.

A pure grievance is any grievance, as that term is defined in section 7103(a)(9), that is not excluded by law from coverage by a negotiated grievance procedure, that does not involve a 4303 or 7512 matter or a similar such matter that has arisen under another personnel system, and that does not involve a complaint of discrimination of the type within the jurisdiction of EEOC. However, pure grievances concern the most common disputes that arise in an employment and collective bargaining relationship. Primarily, pure grievances will involve disputes over the proper interpretation and application of provisions of the collective bargaining agreement and provisions of laws and regulations governing aspects of federal employment in cases concerning such diverse matters as overtime assignments, promotion and detail actions, and just cause for minor disciplinary actions. As for their processing, which is displayed graphically, the negotiated grievance procedure is first examined to determine whether the particular matter has been excluded, as any matter may be by negotiated agreement of the parties. But if the matter is not excluded, under the express terms of section 7121(a)(1), the negotiated grievance procedure is the sole and exclusive procedure available to employees in that bargaining unit for resolving pure grievances.

The application of this exclusivity provision is probably most notable with respect to disputes that for such employees otherwise would have been, and for nonbargaining-unit employees are, appealable to the Merit Systems Protection Board. Predominantly, these involve the denial of a within-grade salary increase or reduction-in-force actions. See, e.g., Patent Office Professional Association and U.S. Patent and Trademark Office, 34 FLRA 883 (1990). For eligible nonbargaining-unit employees and for eligible bargaining-unit employees whose collective bargaining agreement has excluded such matters, these disputes are of course appealable to MSPB. Another notable aspect of this application with respect to these matters is that in resolving such disputes MSPB is governed by section 7701 which does not govern the arbitration of these disputes. Thus, with respect to the denial of a within-grade increase, for example, the Authority has specifically held that in contrast to MSPB an arbitrator is not required to apply either the substantial evidence standard or the harmful-error rule. Department of Education, 17 FLRA 997 (1985); IRS, 17 FLRA 1001 (1985). Accordingly, it must be recognized that the scheme of resolving disputes provided by the CSRA has expressly provided means of resolving these matters generally based on bargaining-unit status that are not governed by the same standards and consequently may not reach the same result in like cases.

Continuing the processing of a pure grievance, if the grievance is not satisfactorily settled, binding arbitration may be invoked by the union which will ultimately result in an award of an arbitrator. Under section 7122(a), either party to the arbitration may file exceptions to the award with the FLRA. Unless provided otherwise, the parties to arbitration will only be the union and the agency, and not the grievant employee, who therefore is not entitled to file exceptions. Finally, under the terms of

section 7123 relating to judicial review, no judicial review is available of the Authority's decision resolving the exceptions unless "the order involves an unfair labor practice." See 6-23 infra for a more detailed discussion of judicial review.

b. Section 4303 or Section 7512 Case.

This category refers to sections of the CSRA and the dispute in these matters arises when an agency takes a 4303 or 7512 action against an employee. 4303 actions are a removal or a demotion for unacceptable performance. 7512 actions are serious adverse actions--removal, suspension for more than 14 days, a reduction-in-grade or pay, and a furlough for 30 days or less. In this type of case, the exclusivity provision of section 7121(a)(1) does not apply and under section 7121(e)(1) a nonprobationary, competitive service employee or a preference-eligible, excepted service employee may have an option. This type of dispute is in the discretion of the aggrieved employee may be appealed to MSPB or a grievance may be filed if the dispute has not been excluded from the negotiated grievance procedure. If the grievance option is elected and the grievance is submitted to arbitration, this arbitration is different from that of pure grievances in two respects.

First, under section 7121(e)(2), the arbitrator in hearing a 4303 or 7512 grievance must apply the same statutorily prescribed standards in deciding the case as would have been applied if the matter had been appealed to MSPB. Thus, in accordance with the evidentiary standards prescribed by section 7701, the decision of the agency in an action based on unacceptable performance must be sustained by the arbitrator, absent harmful error, if supported by substantial evidence. Likewise, in serious adverse action cases the decision of the agency must be sustained, absent harmful error, if supported by a preponderance of the evidence. In addition, as the result of the decision of the U.S. Supreme Court in Cornelius v. Nutt, 472 U.S. 648 (1985), arbitrators must also apply the harmful-error rule of section 7701 precisely as MSPB does. That is, arbitrators can only refuse to sustain an agency's decision by reason of harmful error if the employee has shown error that caused substantial prejudice to the employee's individual rights by possibly affecting the agency decision. Thus, an arbitrator after Nutt may no longer refuse to sustain an agency's decision on the basis of a violation of a collective bargaining agreement that is harmful only to the union and not the employee.

These arbitrations are different from pure grievances in a second respect. In this type of dispute, judicial review of the award is available in the same manner and under the same conditions as if the matter had been decided by MSPB. Thus, these awards are appealable directly to the U.S. Court of Appeals for the Federal Circuit as if the award were the final decision of MSPB. These awards are not appealable to the Authority. Section 4303 and 7512 actions are matters described in section 7121(f), and therefore under the express terms of section 7122(a), pertaining to the filing of exceptions with the Authority, exceptions may not be filed to an award relating to such matters. With respect to the judicial review of these awards, only employees have a

right of appeal. Agencies have no right of appeal, but the Director of the Office of Personnel Management may obtain review of the decision of the arbitrator in the limited circumstances and under the stated conditions of section 7703(d) which essentially are that the arbitrator has erred in interpreting civil service law and regulation and the error will have a substantial impact. Because section 7703(d) is stated only in terms of obtaining review of MSPB decisions, the Federal Circuit has had to clarify its application to arbitration and those decisions should be consulted on the specifics of OPM obtaining judicial review of these arbitration awards. See Devine v. Sutermeister, 724 F.2d 1558 (Fed. Cir. 1983); Devine v. Nutt, 712 F.2d 1048 (Fed. Cir. 1983), *rev'd as to other matters sub nom.* Cornelius v. Nutt, 472 U.S. 648 (1985).

For employees employed in a personnel system other than the ordinary competitive or excepted service system against whom actions similar to those of section 4303 and section 7512 are taken, the processing of their grievances would be very similar. Section 7121(e) indicates that such employees have a similar option of raising the matter under applicable appellate procedures or of filing a grievance if the matter has not been excluded from the negotiated grievance procedure. Section 7121(f) further specifies that when the grievance option has been elected and the matter is submitted to grievance arbitration, judicial review of the arbitrator's award may be obtained in the same manner and on the same basis as could be obtained of a final decision in such matters raised under applicable appellate procedures. See VA Medical Center, Chillicothe, 15 FLRA 448 (1984).

c. Pure Discrimination Case.

A pure discrimination case involves an allegation of employment discrimination within the jurisdiction of EEOC that does not also involve a matter appealable to MSPB.

This type of case commonly involves a claim of discrimination as the result of a failure to be promoted. As with 4303 and 7512 cases, in this type of case the exclusivity provision of section 7121(a)(1) does not apply and under section 7121(d) the employee may have an option. This type of dispute in the discretion of the aggrieved employee may be raised under the equal employment opportunity complaint procedures or a grievance may be filed if the dispute has not been excluded from the negotiated grievance procedure. If the grievance option is elected, the initial processing of the grievance is nearly identical to that of a pure grievance. If the grievance is not satisfactorily settled, arbitration may be invoked and either party may file exceptions with the Authority for its decision resolving the exceptions. Discrimination cases differ from pure grievances in that section 7121(d) provides that the selection of the grievance procedure does not prevent the aggrieved employee from requesting EEOC to review "a final decision" respecting "a complaint of discrimination of the type prohibited by any law and administered by [EEOC]." Because of this provision, EEOC in 1983 amended its regulations to include procedures for an appeal by an aggrieved employee to EEOC from the final decision of the agency on the discrimination grievance as to which arbitration was not invoked, from an arbitrator's award, and from a decision of the Authority resolving exceptions to the arbitration award. 29 C.F.R.

§ 1613.233(b). These regulations also incorporate the statutory rights of an employee to judicial review. Thus, in accordance with the prescribed time frames, an employee can file in an appropriate district court after the final agency decision on the discrimination complaint or after not receiving within the allotted time a decision on the complaint for a de novo review of the case by the court. 29 C.F.R. § 1613.281. Thus, if the pure discrimination grievance can be equated with the discrimination complaint in this respect, which seems reasonable but which, it must be noted, is not expressly stated, the employee has the option of judicial review of the agency denial of the grievance or of the agency action that has been grieved. Because these regulatory provisions do not mention arbitration awards or FLRA decisions, it is likewise uncertain whether the employee has a similar right to judicial review of the arbitrator's award or the decision of the Authority resolving exceptions to the award. Consequently, the full delineation of this right to judicial review must await regulatory or judicial clarification.

As has been noted, in these cases the employee may have an option, but it is an election of remedies provision pursuant to which the employee must choose under which procedure to raise the matter after which the employee will be precluded from raising the matter under the other procedure. Specifically, section 7121(d) provides in this respect that the employee shall be deemed to have exercised the option at such time as the employee timely initiates an action under the applicable statutory procedure or timely files a grievance in writing whichever event occurs first. The Authority has concluded that a grievance filed in accordance with a negotiated grievance procedure raising the matter of alleged discrimination under the Civil Rights Act of 1964 is only precluded or barred by the grievant having earlier raised the same matter by the timely filing of a formal EEO complaint under the complaint procedures set forth in 29 C.F.R. § 1613.214. Consultation with an EEO counselor pursuant to precomplaint procedures does not preclude the subsequent filing of such a grievance. U.S. Marshals Service, 23 FLRA 414 (1986). The EEOC's amendment of its rules in October 1987 was to the same effect. 29 C.F.R. § 1613.219 (1987).

d. Mixed Case.

The last category is a section 7702 or mixed case. A mixed case is one where an agency takes an action against an employee that is appealable to MSPB and the employee asserts that the action was taken on the basis of prohibited discrimination. Common examples would be a removal or demotion for unacceptable performance or a serious adverse action alleged by the affected employee to have been based on discrimination. Because the scheme for processing these matters is very complex, the graphic only summarizes their processing. For more specific details the statutory and regulatory provisions should be carefully consulted, primarily section 7702 and 5 C.F.R. part 1201, subpart D and 29 C.F.R. part 1613, subpart D.

As with pure discrimination and 4303 and 7512 cases, the exclusivity provision of section 7121(a)(1) does not apply and under section 7121(d) the employee may have an option. This type of dispute may be raised in the discretion of the aggrieved

employee under the EEO complaint procedures by the filing of a mixed case complaint with the agency or a grievance may be filed if the dispute has not been excluded from the negotiated grievance procedure. If the grievance option is elected and the grievance is not satisfactorily settled, arbitration may be invoked by the union. Either party to arbitration may file exceptions to the arbitration award with the Authority except for an award where the agency had taken a 4303 or 7512 action against the employee.

As had been noted, under section 7122(a) exceptions to an award relating to such an action may not be filed with the Authority. What differentiates the processing of these matters from all others is that section 7121(d) provides, in addition to the provision for EEOC review discussed with respect to pure discrimination cases, that the selection of the negotiated grievance procedure does not prevent the employee from requesting MSPB to review a "final decision" in this matter. Thus, the aggrieved employee has available both MSPB and EEOC review.

Although it is not as express as with respect to the agency's final decision on the pure discrimination grievance, it appears that the employee has the option of invoking MSPB review at the final agency decision step of the grievance procedure instead of seeking arbitration. See 5 C.F.R. § 1201.154(b). The regulations do expressly provide for the invocation of MSPB review of the final arbitration award or the decision of the FLRA. Thus, the employee could appeal the final award instead of seeking to have the union file exceptions with the FLRA where permitted. If exceptions are properly filed with the Authority by either the union or the agency or both and the Authority issues a decision adverse to the employee, the employee may invoke MSPB review of the Authority's decision. In cases where MSPB review is invoked and MSPB issues a decision adverse to the employee, the employee has the right to petition EEOC to consider MSPB's decision. If the employee petitions EEOC and EEOC accepts the petition, EEOC may either concur in the MSPB decision or issue a decision different from MSPB and forward that decision to MSPB. On receipt of such a decision, MSPB can concur in the EEOC decision or reaffirm its decision. If MSPB reaffirms its decision, the matter is immediately referred to a Special Panel, consisting of permanent chairperson, a EEOC member and a MSPB member, which issues a decision finally resolving the matter. If the Panel decision is adverse to the employee, the employee has the right to file in an appropriate U.S. district court for a de novo review of the case by the court. As provided by regulation, the employee also has the option of seeking judicial review at earlier stages of the processing of these matters. Thus, the employee may file for judicial review of an adverse decision of MSPB instead of petitioning EEOC.

When the employee has petitioned EEOC, judicial review is available of the determination by EEOC not to consider the petition for review of the MSPB decision, the determination by EEOC to concur in the decision of MSPB, and the decision of MSPB to concur in or adopt the decision of EEOC which differed from that of MSPB. Under the statutory and regulatory scheme, it is uncertain whether the employee has the option of seeking judicial review after the final agency decision on the grievance or after not receiving within the allotted time a decision on the grievance. For reasons similar to those stated with respect to pure discrimination grievances, it would appear that such a right is available. What is more uncertain and will need to await regulatory

or judicial clarification is whether the employee also has the right to seek judicial review, as an option to MSPB review, of the arbitrator's award or a decision of the FLRA.

6-4. Multiple Forums.

As indicated by the preceding discussion, an aggrieved employee in many cases has multiple forums available in which to raise a disputed matter although with respect to the available options an election must often be made. In addition to the options already discussed, an employee also may have the option of raising a disputed matter under the grievance procedure or as an unfair labor practice. But again, pursuant to section 7116(d), an election is required which precludes an employee from raising the issue under both procedures. In terms of whether a grievance may be precluded in this respect, section 7116(d) effectively provides that when in the discretion of the aggrieved party, an issue has been raised under the unfair labor practice procedures, the issue may not subsequently be raised as a grievance. Thus, the Authority has recognized that the elements of section 7116(d) which must attach in order for a grievance to be precluded are: (1) the issue which is the subject matter of the grievance is the same as the issue which is the subject matter of the unfair labor practice; (2) such issue was earlier raised under the unfair labor practice procedures; and (3) the selection of the unfair labor practice procedures was in the discretion of the aggrieved party. *E.g., Department of Defense Dependents Schools, Pacific Region*, 17 FLRA 1001 (1985).

In order for element 1 to attach, the issue which is the subject matter of the grievance must be substantially the same issue which is the subject matter of the unfair labor practice charge. In addition, the Authority has held that section 7116(d) only precludes duplicate filings of an issue actually raised in the grievance and unfair labor practice forums and does not extend to an issue which the aggrieved party could have, but did not, raise in the earlier selected forum. *INS, U.S. Department of Justice*, 18 FLRA 412 (1985).

With respect to element 2, the Authority has determined that the critical event as to this aspect of section 7116(d) occurs when the procedures are selected by the filing of a charge or a grievance. Thus, the Authority has held that an issue has been "raised" within the meaning of section 7116(d) at the time of the filing of the unfair labor practice charge even if the charge is subsequently withdrawn and never adjudicated. *Headquarters, Space Division, Los Angeles Air Force Station, California*, 17 FLRA 969 (1985).

As to element 3, the Authority has determined that identity of filing parties is not required. Thus, the Authority has held that this element attaches when the choice of the unfair labor practice procedures was made by the aggrieved party, regardless of who is formally the filing party of the charge. For example, in *U.S. Department of Justice, INS*, 20 FLRA 743 (1985), it was determined that the individual employee was the aggrieved party and that the filing of a charge by the Union was in a representative

capacity in behalf of that employee. Consequently, it was held that the filing of the charge constituted the choice and selection of the unfair labor practice procedures by the employee, the aggrieved party, which precluded raising the issue subsequently under the grievance procedure.

6-5. The Grievance Procedures.

The negotiated grievance procedure normally consists of three or four steps, depending on how many levels of supervisors the employee/union can appeal the decision to. A "typical" four-step employee grievance procedure is illustrated as follows:

Step 1. The aggrieved employee will informally discuss the grievance orally with his or her immediate supervisor within a specified number of days from the complained-of act. A decision will be rendered within a few days of the discussion.

Step 2. If no satisfactory solution is reached, the employee may pursue the grievance by submitting the matter, in writing, within a specified number of days, to the activity head. The activity head will meet with the employee and union representative, discuss the matter, and render a written decision.

Step 3. The grievant may pursue the matter further if is denied by submitting within a specified number of days, the written grievance and the Step 2 supervisor's decision to the Deputy Installation Commander for a decision. The Deputy Installation Commander will meet with the employee, his union representative, and the Civilian Personnel Officer to discuss the matter. A written decision will be rendered within a specified number of days.

Step 4. If the matter is still not resolved, the exclusive representative or management may refer the matter to binding arbitration.

Different procedures will be provided for those grievances initiated by the exclusive representative or by management. Usually, the first step will be omitted. (See the sample grievance provision at the end of this chapter.)

While the labor counselor will not normally be directly involved with the processing of routine grievances, he or she will still have a professional interest in the way they are handled since grievances that are handled by management representation in a perfunctory or sloppy manner will tend to reduce the chances of a satisfactory disposition and push the matter up the grievance ladder and may result in unnecessary appeals to arbitration.

Grievances should be disposed of at the lowest level possible. If the issues between the parties are not identified and developed and the pertinent evidence is not properly collected and preserved early in the process, the task of the labor counselor will be much more difficult in settlement negotiations and preparation for arbitration.

Complaints and disputes should be resolved at the grievance stage if at all possible. Unjustified resort to arbitration will add unnecessary cost, delay and uncertainty to the case, and may have an adverse effect on morale. Arbitration should be the rare exception rather than the rule.

FLRA has recognized an agency obligation to furnish to employees the documents needed during the grievance stages of a controversy. (See U. S. Customs Service, Los Angeles, 10 FLRA 251 (1982).) The Authority has also recognized the propriety of agency personnel preparing for an arbitration (or an unfair labor case) to meet directly with employees. (See IRS, Brookhaven Service Center, 9 FLRA 930 (1982) and U. S. Customs Service, Region V, 9 FLRA 951 (1982).)

6-6. Multiple Sources of "Law".

One of the most significant differences between arbitration in the private sector and the federal sector is the so-called multiple sources of "law" in the federal sector where grievances and disputes can involve law and regulations as well as provisions of the collective bargaining agreement. The basic function of grievance arbitration in the private sector is as a mechanism for resolving disputes which assures for the parties compliance with the terms and conditions of the parties' collective bargaining agreement. This primary function is correspondingly reflected in the coverage and scope of the grievance procedure that is negotiated in the private sector which ordinarily is confined to disputes over the interpretation and application of the collective bargaining agreement.

In contrast the scope of the grievance procedure in the federal sector is much more expansive. Under the CSRA, grievance procedures automatically extend to all matters, except those excluded by law, covered by the broad statutory definition of grievance, unless the parties mutually and specifically agree to exclude any of those matters in their collective bargaining agreement. As earlier noted, section 7103(a)(9) broadly defines grievance as any complaint by any employee concerning any matter relating to the employment of the employee; any complaint by a union concerning any matter relating to the employment of any employee; or any complaint by any employee, labor organization, or agency concerning the effect or interpretation, or claim of breach of a collective bargaining agreement or any claimed violation, misinterpretation, or misapplication of any law, rule or regulation affecting conclusions of employment. With this broad statutory definition of grievance and with relatively few matters excluded by law in the federal sector, an important additional function of the negotiated grievance procedure and grievance arbitration under the CSRA is as a means of assuring, and if necessary enforcing, compliance with law and regulation as well as enforcing compliance with the terms and conditions of the parties' collective bargaining agreement. As a consequence, the parties, the party representatives, and the arbitrator in the federal sector unlike the private sector will be constantly dealing with the

interpretation and application of laws, rules, and regulations in addition to the interpretation and application of provisions of the collective bargaining agreement.

Because of this significant difference, arbitrators with substantial private sector experience and comparatively little federal sector experience must be educated and instructed on this expansion of the negotiated grievance procedure and arbitration in the federal sector to understand that consideration of laws, rules, and regulations in the federal sector is not precluded but is mandatory. As stated by the Authority in Louis A. Johnson VA Medical Center, 15 FLRA 347 (1984), nothing prevents an arbitrator from considering the meaning and applicability of relevant law and regulations when resolving a grievance under the negotiated grievance procedure. Indeed, the Authority emphasized that when exceptions are filed, section 7122 authorizes the Authority to take such action as it considers necessary with respect to an arbitration award which it finds deficient because the award is contrary to any law, rule, or regulation. Thus, the Authority specifically advised that to "avoid such findings of deficiency by the Authority, an arbitrator must perforce consider any relevant law, rule or regulation when fashioning a grievance arbitration award in the federal sector." Correspondingly, the arbitrator must be provided with accurate and complete reference materials to all laws, rules, and regulations that each party will rely on in developing its case.

In presenting the case, and in any post-hearing brief, the labor counselor should take special care to make sure that the arbitrator is in a position to fully understand the meaning of a particular law, rule or regulation and the reasons for asserting its applicability to the facts of the case. When the cited authority is highly technical or complex, or would appear obscure to an outsider, it will be necessary to develop its background and operational context. (See Norfolk Naval Shipyard, 9 FLRA 538 (1982), where an award was remanded because the arbitrator was not aware of the specialized meaning of "offense" in a disciplinary matter.) This may be done with witnesses, "expert" or otherwise, who can educate the arbitrator about the background and operational aspects, by agreeing to stipulations, by providing "legislative" history, and the like. FLRA has indicated that it is not improper for an arbitrator to devise a "rule of reason" for applying a regulation in the absence of guidance from the parties. (See Community Services Administration, 5 FLRA 254 (1981).)

6-7. Submission Statement (The Issue Statement).

As is almost always the case in the private sector, an unresolved grievance in the federal sector will be submitted to binding arbitration by either the agency or the exclusive representative by simply invoking it in a timely fashion. This is because the CSRA requires a collective bargaining agreement to contain procedures for the settlement of grievances which must include arbitration as the terminal step. So a "submission statement" does not serve as a commitment to arbitration in general, but rather it serves at the very least, to identify the grievance or grievances which the selected arbitrator will hear. It will state the question or issue to be resolved. Submission statements are highly encouraged.

In many cases these may not even be a "statement" in the accepted sense. The "submission" will consist merely of the original grievance, step answers and any correspondence between the parties relating to the grievance, with a referring agency (the Federal Mediation and Conciliation Service or the American Arbitration Association) and the arbitrator. Arbitrations may, and often do, proceed with nothing more formal in the way of a submission. In such a posture, the "case" to be decided, that is, the issues to be decided, the facts to be found, and the appropriate remedy, if any, will have to be deduced from what transpired during the processing of the grievance and ultimately what goes on in the arbitration proceeding. Some types of cases, such as most discipline cases, can proceed reasonably well in this configuration, since the operative factual events are usually readily discernible or agreed upon in general and the legal issue in any event would likely reduce to a stylized statement--"Was there just cause for the disciplinary action taken on such-and-such date? If not, what is the appropriate remedy?" (See San Antonio Air Logistics Center, 9 FLRA 378 (1982).)

Nevertheless, while a submission statement is not jurisdictional, that is, necessary to the conduct of the arbitration, a well thought out submission statement will prove useful to the parties in preparing and presenting their respective cases, and to the arbitrator in the conduct of the hearing and in deciding the case. It will often identify the controlling provisions of the collective bargaining agreement and it will specify the relief desired. The original grievance statement may be inarticulate or incomplete and the record produced by the grievance steps may not do much to clarify the crux of the dispute.

Once arbitration is invoked, it is good practice for the persons responsible for preparing each side of the case to attempt to reach a mutual understanding of what the case is all about. If the grievance steps have been done well, the factual contentions and the legal claims should have become apparent. An early appreciation of the dimensions of the case should facilitate settlement discussions, or at least can lead to the dropping of erroneous or unsupported claims and provide a basis for possible stipulations of facts.

If there is no precise issue specified, the authority of the arbitrator is unrestricted and he or she may decide any dispute presented which arises under the collective bargaining agreement. By a mutually agreed submission statement, the parties may restrict, or enlarge, the arbitrator's jurisdiction over the case. Once the issue (or issues) to be decided are agreed upon, each party can prepare their evidentiary and legal case with economy and precision and with confidence that the arbitrator will decide the case which the parties have in mind and have prepared for.

A submission statement may have other additional benefits. A statement of the specific matter to be arbitrated may prove useful in determining whether collateral proceedings, such as a parallel unfair labor practice hearing, should continue or be

stayed pending arbitration. The statement will be useful to the arbitrator in deciding the materiality or relevancy of evidence that is offered at the hearing. Finally the submission statement may prove helpful on appeals to the Authority, since an arbitration decision which goes beyond the scope of the submission may be found deficient.

FLRA has held that arbitrators exceed their authority by deciding an issue not included in an agreed submission. Veterans Administration, 24 FLRA 447 (1986).

If the parties cannot agree to a submission, one or both should present their own unilateral statements of the issue to the arbitrator. Often the differences are not all that great and the arbitrator may bring the parties together. Even if no agreement can be reached, the statements of position will be helpful to the arbitrator's understanding of the dimensions of the case.

In the absence of an agreed statement of the issue, the Authority, like the federal courts, will accord an arbitrator's formulation of the issues to be decided the same substantial deference accorded an arbitrator's interpretation and application of a collective bargaining agreement. Housing and Urban Development, 24 FLRA 442 (1986).

6-8. Enforcement of Agreement to Arbitrate.

Because the statutory policy of the United States favors arbitration in the federal labor management sector, it will be a rare situation which requires outside coercion against one of the parties to abide by the commitment in their collective bargaining agreement to arbitrate a grievance which has been properly carried to that level. The CSRA contains no specific provision for the enforcement of the obligation to arbitrate. An unfair labor practice proceeding would be in order. A refusal by an agency to arbitrate would constitute an unfair labor practice under section 7116(a)(1), (5), and (8). A refusal by a union to arbitrate would constitute a violation of section 7116(b)(5) and (8).

Once an arbitrator has been selected, the arbitration may proceed ex parte. An award would be binding on the uncooperative party if there has been proper notice, no procedural irregularity and if the successful party "proves" its case or otherwise "bears" its burden under the CBA.

In the private sector the obligation to arbitrate generally persists beyond the termination date of the collective bargaining agreement, at least when the events giving rise to the grievance occurred during the life of the collective bargaining agreement. This is the policy also followed in the federal labor management sector. FLRA has found it to be an unfair labor practice for an agency to refuse to process a grievance over matters which occurred prior to the expiration of the CBA. It declared, "In the Authority's view, the purposes and policies of the Statute are best effectuated by a

requirement that the existing personnel policies and practices and matters affecting working conditions -- including negotiated grievance and arbitration procedures -- must continue as established upon the expiration of a negotiated agreement, absent an express agreement by the parties to the contrary or unless modified in a manner consistent with the Statute." (See Dept. of the Air Force, 35th Combat Spt. Gp. (TAC), George AFB, CA, 4 FLRA 22 (1980).)

Even though the FLRA has recognized that an ex parte arbitration may proceed in the absence of one of the parties, it has declared refusal to participate to be an unfair labor practice. (See Department of Labor, Wage and Hour Division, 10 FLRA 316 (1982).)

6-9. Variety of Arbitrator Arrangements.

The collective bargaining agreement, of course, will contain the arbitration arrangement(s) which the parties have agreed to. The choice may include the use of: (1) ad hoc arbitrators; (2) a permanent umpire; (3) tri-party boards, or (4) expedited procedures.

The use of ad hoc arbitrators is the mostly widely used arrangement in both the private and public sector. The ad hoc arbitrator will be appointed to arbitrate a particular case between the parties and upon completion of his or her office, the relationship with the parties will cease. While the parties may select an arbitrator from those that are personally known and acceptable to them, most likely the selection will be from a list of experienced labor arbitrators supplied by the Federal Mediation and Conciliation Service or the American Arbitration Association.

If an installation generates a large number of arbitrations or if there is need for arbitrators who are acquainted with special needs or complexities, a permanent umpire or permanent panel of arbitrators may be provided for in the collective bargaining agreement. The appointment process will be greatly shortened. The presentation of cases will be expedited since the permanent arbitrator will not have to be "educated" about many of the standard details concerning the parties, and their operations and practices. Also the decisions of permanent umpires/arbitrators can be expected to be more consistent and sensitive to the particular circumstances of the parties.

Tri-party arbitration boards consist of a management member, a union member and a neutral member (usually an arbitrator selected through the FMCS or AAA). Permanent tri-party panels have the advantages of the permanent umpire systems and provide each side direct participation in the decisional process and by providing expertise and special perceptions from both sides. In practice, their use also tends to bring in an element of partisanship which places the neutral member in the position of tie-breaker.

The logistical problems may be significant when an ad hoc neutral member is used, especially if he or she lives at a distance. There may not be adequate opportunity for the board to meet, become acquainted and exchange views before, during and after the hearing. Often the ad hoc neutral member will leave the hearing with the understanding to decide the case and that the winning side will "vote" with the "majority" and the losing side will "dissent." It is not surprising that the ad hoc tri-party board is very frequently "waived" altogether and the neutral member performs as a sole arbitrator.

Expedited procedures are designed for the rapid processing of the "routine," minor disciplinary action grievances whose validity will turn on the facts that can be proved, or other kinds of grievances which do not require any significant interpretation of the collective bargaining agreement. A rotating panel of selected arbitrators is used.

The arbitrator at the top of the list is notified and is expected to be able to hear the case within a stipulated period. If this cannot be done, the next arbitrator will be called.

Two or more short cases may be considered at a single hearing. The arbitrator will be required to issue a bench decision or decide the case within a few days. The award need not be accompanied by an opinion and any opinion, if used, must be brief. Awards in expedited proceedings carry no precedential value and will not be released for publication, including even those containing a short opinion. The U.S. Postal Service has used expedited arbitration for several years. (An expedited arbitration provision is printed at the end of this chapter.)

6-10. Selection of an Arbitrator.

The selection of an ad hoc arbitrator, and the selection of the initial members of a permanent panel or a replacement member requires the exercise of judgment and should be done on the basis of the best available information about the candidate(s). All of the arbitrators on a FMCS or AAA list may be strangers to the parties. Sources of information include biographical information supplied by the FMCS or AAA, or that which may be in the LAIRS system. Prior awards of given arbitrators may have been published by a labor law service publisher such as Federal Labor Relations Press, BNA or CCH, or in other collections. Useful information may also be garnered from others who have had experience with the arbitrator.

An arbitrator who is selected by the parties is under an obligation to disclose to the parties any circumstances, associations or relationships which might reasonably raise any doubt about his or her impartiality or technical qualifications regarding a particular case. If either party declines to waive a presumptive disqualification, the arbitrator should withdraw from the case. Impartiality or bias, preexisting or which may occur subsequent to appointment, may provide the basis for vacation of the arbitrator's award.

6-11. Arbitrability Challenges.

Section 7121 provides that the collective bargaining agreement "shall provide procedures for the settlement of grievances including questions of arbitrability." In all likelihood, a collective bargaining agreement will provide that these kinds of questions be decided by the arbitrator preliminary to a consideration of the merits. Even if the collective bargaining agreement is silent on the point, it is likely that the task must be left to the arbitrator since, in the absence of an agreement, there appears to be no other readily available alternative mechanism for deciding it. Even if one were identifiable, a collateral determination by a separate entity would likely be sufficiently cumbersome and time consuming as to conflict to the policy of "expeditious processing" enunciated by the Act.

The two general categories of arbitrability challenges are: (1) procedural and (2) subject matter. The second type is a challenge to the arbitrator's authority to deal with the matter, or parts of it, while the first type may be considered to be essentially a request that the arbitrator dispose of the matter on a procedural point without reaching the merits.

An issue of procedural arbitrability will concern questions of whether or not a procedural requirement or a formal prescription contained in the collective bargaining agreement for the processing of the grievance has been satisfied by one of the parties.

These may concern such questions as whether the grievance or an appeal to one of the grievance steps was filed or completed in a timely fashion, whether the grievance was signed by the proper party or a notice given in the prescribed form. Disposition of these issues usually turn on such considerations as findings of fact, determination of whether under the agreement the prescription is mandatory, whether there has been a waiver, estoppel or an excuse from a requirement, or whether it has been satisfied. The FLRA has uniformly held that questions of procedural arbitrability are questions solely for determination by the arbitrator and that exceptions disagreeing with that determination consequently provide no basis for finding an award deficient. *E.g., Headquarters, Fort Sam Houston*, 15 FLRA 974 (1984).

Substantive arbitrability will concern questions of whether the dispute is of the type within the scope and coverage of the negotiated grievance procedure. In this type of case, there may be no dispute as to the facts or any question of procedural regularity. The crucial question is how to properly characterize the dispute and whether or not it is subject to grievance and arbitration under law and the collection bargaining agreement. The arbitrator should consider an arbitrability issue before reaching the merits. A bench decision may be issued on arbitrability before hearing the merits, or arbitrability and the merits may be heard at the same hearing and the arbitrator will decide the respective issues later. (See Department of Army, 83d ARCOM, 11 FLRA 55 (1983)). A matter continues to be grievable and arbitrable even though the aggrieved employee has subsequently been promoted to management. (See IRS, Brookhaven Service Center, 11 FLRA 486 (1983)).

Unlike practice in the private sector, an arbitrator in the federal sector has original plenary powers to decide subject matter arbitration issues, subject only to any limitation of law or the terms of the CBA. The Supreme Court has decided that in the private sector the question of fundamental subject matter arbitrability is initially a matter for judicial determination. Nevertheless, this preliminary consideration is not to implicate the merits and doubts are to be resolved in favor of arbitrability. (See Steelworkers v. Gulf Navigation Co., 363 U.S. 574 (1960); Steelworkers v. American Manufacturing Co., 363 U.S. 564 (1960); and Steelworkers v. Enterprise Wheel and Car Corp., 363 U.S. 593 (1960)). Since the CSRA provides no judicial or direct administrative mechanism for addressing preliminary arbitrability issues and because section 7121 specifically requires the agreement to provide for arbitrability issues, it appears that preliminary consideration of subject matter arbitrability questions by external authorities is precluded unless the parties provide otherwise.

Subject matter arbitrability is usually considered "jurisdictional" by arbitrators and many will allow it to be raised for the first time at the arbitration. But of course, since "jurisdiction" in arbitration is created by agreement of the parties themselves it may be informally waived even though the terms of the CBA literally preclude the consideration of a particular case. This is on the theory that parties to an existing controversy have the capacity to submit controversies to arbitration by agreement even though there is no present or preexisting obligation to do so. Of course, under the CSRA the parties could not agree to something excluded from grievance/arbitration by law.

6-12. Arrangements for the Hearing.

Once the date and time for the arbitration hearing have been fixed by the parties and the arbitrator, the parties will generally be responsible for the details of arrangements for the hearing. Of course, if they do not or cannot take responsibility the arbitrator will take charge.

If an official transcript is to be made, the court reporter must be scheduled. Unless the collective bargaining agreement provides otherwise, an official transcript should only be taken when the seriousness of the case justifies it. Absent other justifications, even a "complicated" case (because of technical, factual or legal complexities) may be adequately handled by making an informal tape recording of the proceedings and providing the arbitrator with a copy of a typescript or the tapes.

The location of the hearing will probably be left to the discretion of the parties. Usually it will take place in a room on the premises of the agency or in the union hall, but it may be scheduled at some "neutral" location, such as a public court room, library or a motel conference room. The hearing room must provide a quiet, adequate and comfortable environment for a proceeding that may last for a number of hours. Some preliminary consideration should be given to scheduling the breaks. It will be helpful if the parties can agree to such contingencies in advance.

Arrangements for assuring the attendance of witnesses should be made. The bulk of witnesses will likely be government employees. These should be identified and the parties should assure that they will be present at the hearing place or that they can be expected to respond promptly when called from their work-place. If witnesses are to be sequestered, a comfortable place for them to wait should be provided.

6-13. Pre-Hearing Discovery.

In the private sector, formal pre-hearing procedures are very limited, and there is no reason to presume that the situation will be much different in the federal labor management sector. The CSRA does not address the subject and collective bargaining agreements are not likely to deal with it.

A candid and thorough processing of the dispute at all grievance stages should prove to be a more than adequate substitute for formal discovery procedures in most cases. Arbitrators in the private sector have remanded a case back to the grievance stage so that informal discovery may be completed. The legal basis for more formal discovery authority in the arbitrator is not at all certain when the collective bargaining agreement itself is silent. State arbitration statutes and the Federal Arbitration Act, as well as the AAA rules and civil procedure laws, have been cited as possible sources. Some arbitrators have claimed inherent authority deriving from their right to rule upon procedural questions in the conduct of the hearing. The ultimate sanction for extreme failures to cooperate at the pre-hearing stage would be the filing of an unfair labor charge. (See Internal Revenue Service, Buffalo District, 7 FLRA 654 (1982).)

6-14. The Hearing.

The arbitrator is in control of the hearing and it will reflect his or her personal conceptions of what an arbitration hearing should be like and what the role of an arbitrator should be. Because of its nature, the arbitration hearing will contain the basic elements of a judicial trial (opening statements, presentation of documentary evidence, examination and cross-examination of witnesses, closing arguments, etc.), but the style of the hearing may range from the rigidly formal to the very casual. The arbitrator may choose to take a dominating role in the proceedings or may be quite passive and non-directive.

There is precedent in the private sector for the arbitrator to proceed ex parte when one of the parties fails to appear, provided the party has received proper notice. The arbitrator will be reluctant to proceed this way and will probably make an attempt to induce the participation of the reluctant party. Failing this, the party in attendance will be expected to present its case and, if they have the burden of proof, satisfy that burden. (See Harry S. Truman Memorial Veteran's Hospital, 6 FLRA 565 (1981)).

Under the CSRA, the agency and the exclusive representative are the formal parties in the arbitration proceeding, and as such will be in a position to control their respective sides of the controversy and to select the person or persons to present the case. (See Immigration and Naturalization Service, 7 FLRA 549 (1982).) This is the practice in the private sector also. Occasionally an aggrieved employee may wish to be represented by counsel of his or her own choosing. The employee has no right as such.

The hearing will seldom last more than one day. Continuances or adjournments should be granted at the request of a party for good cause, such as the absence of a material witness. An improper refusal may provide the basis for vacating the award, may require a reopening of the case, or may affect the weight that will be given the award in a collateral proceeding.

6-15. Witnesses.

Witnesses may or may not be required to testify under oath depending on the wishes of the parties or the arbitrator or the mandate of the collective bargaining agreement. At the request of one of the parties, witnesses may be removed from the hearing room until after they have presented their testimony. Of course, the grievant will be allowed to be present throughout the proceedings.

Wide latitude will be allowed the parties in their presentation of testimonial evidence. The number and order of witnesses will be largely left to the discretion and needs of the parties. Cross-examination will not be limited to the scope of the direct examination. Witnesses will be allowed to testify out of sequence when practical considerations necessitate such. For example, a witness just coming off the night shift would be allowed to testify first in order to return home to sleep.

Though the parties will be allowed wide freedom in the choice of witnesses, as a matter of practice, each side may be reluctant to call witnesses from the "other" side. The one common exception occurs in discharge or disciplinary suspension cases. In such cases management, which will have the burden of proof and will proceed first, may call the grievant as an adverse witness.

In the private sector arbitrators will occasionally issue subpoenas for the attendance of witnesses. They undoubtedly have the authority to issue them and, as a practical matter, the arbitrator's subpoena will usually be enough. A court may or may not enforce the arbitrator's order. (See Washington-Baltimore Newspaper Guild v. Washington Post, 442 F.2d 1234 (D.C. Cir. 1971); Department of Labor and Local 12, AFGE, FLRC 77A-75 (1978)). A court may issue its own subpoena, deriving its authority from either a state arbitration statute or the federal arbitration law.

6-16. Burden and Quantum of Proof.

Ordinarily, the burden of proof, in the sense of persuasion, will lie with the moving party (the grievant) and this will also determine the order of presentation. However, practical considerations may alter the order in which the case will be developed. Discipline cases are the exception to the rule. In these, management, ordinarily, will have the burden of proving the justification of the disciplinary action that was taken. (See Alaska Area Native Health Service, 80 FLRR & 2-1680; Immigration and Naturalization Service, Laredo, TX, 79 FLRR & 2-1320; and Federal Aviation Administration, St. Louis, MO, 80 FLRR & 2-1907.)

Once the party with the burden of proof has established a *prima facie* case, the burden "shifts" to the other party to rebut, mitigate or otherwise defend as they are able. Unless otherwise expressly provided, the arbitrator may fix the standard of proof. (See Department of Defense, Dependents Schools, 4 FLRA 412 (1980).) In most instances the quantum of proof will be "preponderance of the evidence." In discharge cases where the employee is charged with criminal or morally reprehensible conduct, some arbitrators have required "proof beyond a reasonable doubt" to establish the case for the discharge. This high standard of proof is justified by the social stigma involved. Not all arbitrators will apply this standard. They more likely will require "clear and convincing proof" in discharge cases, though some will require only a "preponderance" of evidence. (See Federal Aviation Service, St. Louis, MO, 80 FLRR & 2-1907. The arbitrator would have applied "clear and convincing" proof; however the CBA only required a "preponderance".) In cases where the exercise of managerial judgment is involved--such as evaluating, comparing and ranking employee skills for a promotion decision--the quantum of proof to upset the determination may be proof that it was "arbitrary, capricious and unreasonable," or to put it another way, the managerial decision will be sustained if there is substantial evidence to support it.

For the special statutorily prescribed rules of proof for unacceptable performance cases (§ 4303) and adverse action cases (§ 7512) See § 6-3.b., supra.

6-17. Rules of Evidence.

The guiding imperative in an arbitration proceeding is to provide a fair and expeditious hearing which will provide each party with a full opportunity to all the evidence which they deem material and relevant to their case. Technical legal rules of evidence will not be applied. Yet, one should not lose sight of the common sense bases for the rules of evidence.

Hearsay evidence will almost always be admitted, for "what it is worth", if it is somehow relevant to the issues of the case. (See VA Medical Center, Bedford, MA, 2 FLRR 1131.) Leading questions are broadly tolerated. These liberal practices greatly speed the development of the case and satisfy the parties that they have had a "full day in court." But when elements crucial to the ultimate disposition of the case are reached,

arbitrators may be expected to "tighten up" and insist that the "best evidence" be produced: e.g. a key witness be brought in for cross-examination unless there is a very good reason not to. They also will request that the witness be allowed to testify in his or her own words. Even when the arbitrator does not "tighten up", the parties should do so themselves when crucial issues are involved since the arbitrator will be more skeptical when only secondary sources are used without good explanation or upon realization that the examiner ended up saying more about the facts than did the witness.

Depositions will be readily accepted and ex parte affidavits are often received. This may be the only practicable way that certain kinds of information can be brought before the arbitrator, either because outsiders will not cooperate beyond providing these or their presence would be too expensive. There are numerous instances when unverified letterhead and prescription pad statements from medical doctors or their office staff will be accepted.

In disciplinary cases, evidence of prior misconduct will not be received to prove the subsequent charges of misconduct but will be considered in evaluating the justification of the harshness of the disciplinary sanction that was imposed. (See National Gallery of Art, 81 FLRR & 2-1140.)

Evidence connected with settlement offers and negotiations will be excluded by arbitrators. However, evidence concerning grievance discussions will not be privileged.

If classified evidence will be an essential part of an arbitration case, the parties should insure that the arbitrator selected has a security clearance sufficient to receive such information.

6-18. Principles of Construction.

An arbitrator's authority is principally derived from the collective bargaining agreement and the arbitrator is to construe and apply that collective bargaining agreement to the facts of a particular case. In the private sector a body of doctrine has developed regarding how the collective bargaining agreement should be construed. Essentially, they are not much different than the principles of construction applied to any private document. Under the CSRA, the arbitrator will be called upon to construe applicable laws, rules and regulations as well as construing the collective bargaining agreement.

In dealing with the collective bargaining agreement, arbitrators will begin with the assumption that they are obliged to enforce the words of the collective bargaining agreement and that they are confined by and to those words unless there are exceptional circumstances. Thus, initially they will search for the meaning of the words within the four corners of the document itself. This means they will search for meaning by considering the words themselves, the context in which they are used, related

provisions, whether the words are used in a technical or ordinary sense, whether they are used in a special or general provision, etc. Any of the so-called intrinsic rules of construction may be used to ascertain the meaning of the collective bargaining agreement, including reasonably implied meanings.

In the event that the crucial language proves to be ambiguous, then extrinsic evidence will be resorted to. (See XVIII Airborne Corps, Ft Bragg, NC, 81 FLRR & 2-1021.) One of the most common extrinsic aids to meaning is "bargaining history." This includes contractual proposals/counter-proposals, inclusions/exclusions or removals of contract language. (See Social Security Administration, Philadelphia, PA, 79 FLRR & 2-1437.) A second common extrinsic aid is "past practices." A past practice is a long-standing and consistent mode of conduct known to both parties under circumstances that indicate it represents the accepted way of administering a particular provision of the collective bargaining agreement. (See San Antonio Air Log Center, Kelly AFB, TX, 81 FLRR & 2-1222.) Arbitrators may consult textbooks for guidance as an aid to interpretation. (See Department of Air Force, Los Angeles Air Station, 6 FLRA 664 (1981)).

Arguments about the effect of so-called "past practices" may also be to the effect that the party is "estopped" from changing the practice once it is well established and has come to be relied upon or that the practice represents an informal contractual undertaking by the parties which modifies the existing contract or adds to it. (See Naval Ordinance Station, Louisville, KY, 79 FLRR & 2-1206) While many arbitrators will readily accept evidence of past practice to cast light on unclear language, many will reject the use of past practice to establish an estoppel or a new contractual undertaking. Mere nonuse of a right founded in the CBA will not amount to a binding past practice or waiver. (See Federal Correctional Institution, Petersburg, VA, 80 FLRR & 2-2002.)

However, once the arbitrator has determined whether or not there is a binding past practice and once the arbitrator has rendered an award constituting the interpretation and application of the collective bargaining agreement, that determination and that award are virtually unreviewable. The Authority has continuously held that the interpretation and application of the collective bargaining agreement is a matter for the arbitrator and to the extent exceptions constitute disagreement with that interpretation and application no basis is provided for finding the award deficient. *E.g.*, SSA, 10 FLRA 436 (1982). Likewise, the Authority has held that disagreement with the arbitrator's determination on whether or not there is a binding past practice provides no basis for finding an award deficient. See RCPAC, 10 FLRA 507 (1982).

6-19. Remedies.

In the private sector arbitrators consider that their appointment carries with it the implied power to devise remedies appropriate to the needs of the case, whether or not the remedy is specifically provided for in the collective bargaining agreement or the

submission agreement. Of course, the collective bargaining agreement may explicitly restrict the arbitrator's ambit. In the federal sector it is recognized that arbitrators have broad remedial powers. (See Veterans Administration Hospital, Newington CN, 5 FLRA 64 (1981)).

The arbitrator may order a party to conform their conduct to the requirements of the collective bargaining agreement, either in general terms or in detail, or the arbitrator may prohibit conduct which is violative of the collective bargaining agreement. In non-disciplinary cases, a "make whole" remedy may be ordered which would include payment for lost economic opportunities, compensatory overtime opportunities, promotion or promotion preferences. For a promotion remedy to be sustained, it is necessary to prove that an unwarranted action was taken and that "but for" that action the grieving employee would have received the promotion. (See National Bureau of Standards, Washington, DC, 3 FLRA 614 (1980), following OPM advice concerning binding OPM directives.) When no causal connection is proven the appropriate remedy would be priority consideration at the next promotion opportunity. (See Naval Mine Engineering Facility, 5 FLRA 452 (1981).)

In disciplinary cases the remedy may include reinstatement (absolute or conditional), with or without back pay, or a reduction of the discipline that was assessed. Award requiring management to "admonish" a supervisor has been held proper. VA Hospital, Ft. Howard, MD, 11 FLRA 10 (1983).

The arbitrator is not required to compute the exact amount of economic damages that are to be awarded. The award will be considered sufficiently complete and final if a formula is provided for the parties to follow. On rare occasions, an additional hearing may be necessary to implement the award. An award that requires the performance of a useless act may not be enforced. (See New York Division of Military and Naval Affairs, 1 FLRA 823 (1979), in which an arbitrator had ordered the rerun of a promotion activity). An award which only "suggested" that something be done has been sustained. (See National Bureau of Standards, Boulder Laboratories, 9 FLRA 433 (1982)).

Any backpay remedy subject to the Back Pay Act (5 U.S.C. § 5596) must satisfy the requirements of that Act. In this regard the Authority has consistently stated that the Back Pay Act requires not only a determination that the aggrieved employee was affected by an unjustified or unwarranted personnel action, but also a determination that such unwarranted action directly resulted in the withdrawal or reduction in the pay, allowances, or differentials that the employee otherwise would have earned or received. Thus, in order for an award of backpay by an arbitrator to be authorized by the Act, the arbitrator must find that an agency personnel action with respect to the grievant was unjustified or unwarranted, that such unjustified or unwarranted personnel action directly resulted in the withdrawal or reduction of the grievant's pay, allowances, or differentials, and that but for such action, the grievant otherwise would not have suffered such withdrawal or reduction of pay, allowances, or differentials. E.g.,

Aberdeen Proving Ground, 19 FLRA 258 (1985). Furthermore, the employee is entitled, on correction of such a personnel action, to receive reasonable attorney fees related to the personnel action which shall be awarded in accordance with standards established under section 7701(g) pertaining to MSPB.

Similarly, although retroactive promotion may be a proper remedy under certain circumstances, it cannot be made back to a time at which the grievant was not yet qualified for the position (Adjutant General of Michigan, 11 FLRA 13 (1983), or where the position was not yet established (SEIU Local 200, 10 FLRA 49 (1982)). It may be proper for the arbitrator to order that a grievant receive "special consideration" next time (ACTION, 11 FLRA 514 (1983)). In a promotion re-run order the arbitrator may not restrict the candidates to the original group considered (Defense Contract Administration, 10 FLRA 547 (1982)).

6-20. Post-Hearing Procedures.

After the evidentiary hearing is closed there is rarely need for a reopening, though for good cause a reopening may be ordered by the arbitrator *sua sponte* or at the request of one of the parties.

Post-hearing briefs may or may not be necessary. They may be particularly helpful to the arbitrator in factually complicated or highly technical cases, or when the legal concepts are complicated or unusually subtle. Obviously no new evidence may be introduced at this stage and any new legal theories interjected in the brief will be ignored by the arbitrator. Briefs are usually sent to the arbitrator for exchange or the parties may exchange them directly on a specified date. In the ordinary case a good summation should suffice.

6-21. The Award.

An arbitration award should be in a writing and signed by the arbitrator. See SBA and AFGE, 38 FLRA 386 (1990). If an award is served on the parties by mail, there should be a transmittal letter by the arbitrator clearly indicating the date of service because this date commences the 30-day period during which exceptions may be filed under section 7122(a) with the Authority.

The award must contain a resolution of the grievance capable of being understood by the parties and being implemented so that any further litigation on the matter may be avoided and that any collateral proceedings may be appropriately resolved.

An opinion is not essential to the validity of an award, unless required by law or the collective bargaining agreement, but the practice of arbitrators is to provide a written opinion which purports to explain the bases of fact and legal analysis which underlie the

award. FLRA has not insisted that the arbitrator explicitly discuss every issue, charge and CBA citation. Immigration and Naturalization Service, 8 FLRA 248 (1982).

The doctrine of stare decisis does not exert a very strong influence in the field of arbitration, but similar cases will be considered for their educational and persuasive effect. Res adjudicata has a stronger influence because of the concept of "finality" and concerns that the arbitration process should provide stability for the parties. But on occasion arbitrators will refuse to be bound by a prior award between the parties which covers the same point.

Under the common law rule of functus officio, once an award has been rendered the arbitrator has no power to recall the award, order a rehearing, amend the award or interpret it. FLRA has generally acknowledged the applicability of this rule. See American Federation of Government Employees, Local 1501, 7 FLRA 424 (1981). The collective bargaining agreement may, of course, specifically incorporate the rule or may provide otherwise. In the decisions of the FLRA, there are instances in which the arbitrator has retained jurisdiction beyond the date of the award. For example, in NLRB Union, Local 19, 7 FLRA 21 (1981), the arbitrator retained jurisdiction for 90 days following the award, "to resolve any problem resulting from the award." FLRA will not entertain an appeal until the arbitrator's decision is "final." See Hawaii Federal Employees Metal Trades Council, AFL-CIO, 6 FLRA 667 (1981); NTEU, Chap. 165, 9 FLRA 1031 (1982).

6-22. Review of Arbitration Awards.

Unlike the private sector where arbitration awards are subject to judicial review, review in the Federal sector in most cases is by filing exceptions to the award with the Federal Labor Relations Authority under section 7122. Probably, the best explanation of how this review by the Authority works is the actual language of section 7122 pertaining to that review.

Two provisions that are critical to the means of this review are the filing period and compliance provisions of section 7122(b) providing that if no exception is filed during the 30-day period beginning on the date the award is served, the award is final and binding and providing that an agency shall take the action required by a final award.

The 30-day filing period for exceptions may be the most important provision in the review of arbitration awards to understand because it controls whether review has been timely invoked. It is important to understand because the provision is jurisdictional: the Authority is not empowered to waive or extend the 30-day requirement. As to the actual computation of the 30-day period, this period begins on the day the award is served. This provision is the result of an amendment in 1984 to change the beginning of the period from the date of the award to the date of the service of the award to correct the perceived inequity of some situations where the arbitrator

dated the award, thereby commencing the 30-day period in which exceptions must be filed, but failed to immediately transmit the award to the parties. In computing the 30-day period, the exception must be filed within 30 days unless the 30th day is a Saturday, Sunday, or Federal holiday in which event the exception must be filed by the next day that is not a Saturday, Sunday, or Federal holiday. If the award was served by mail, an additional 5-days is added to the filing period, computed taking into account weekends and holidays, and is extended if the 5th day falls on a Saturday, Sunday, or Federal holiday. This additional 5 days which is generally provided when service is by mail was not provided before the amendment of the Statute, but only became available as the result of the change to specifically reference the date of service of the award. However, the most significant development in the filing of exceptions was the Authority's adoption in December 1986 of the so-called mail-box rule. Section 2429.21 of the Authority's Rules. Until the change, filing required receipt by the Authority within the allotted time period. With respect to filing by mail, the revised rules now provide that the date of filing is the date of mailing indicated by the postmark date.

A word of caution is necessary on government-franked envelopes. The revised Rules provide that if no postmark is evident on the mailing, as will usually be the case with government-franked envelopes, it is "presumed" to have been mailed 5 days prior to receipt. Although using the word "presumed," the Rules do not state a rebuttable presumption. The use of the word "presumed" instead describes how the rule is implemented. Veterans Administration Medical Center, 29 FLRA 51 (1987). Specifically, the rule provides the method of determining the date of filing in the absence of a postmark: namely, the date of receipt minus five days. Agency representatives are not without flexibility. For example, the Postal Operations Manual of the U.S. Postal Service expressly provides for postmarking of specific government mailings on the request of an agency. Thus, a postmark of a government-franked envelope can be obtained to assure timely filing. Furthermore, when certified mail is used, the postmarked certified mail receipt will suffice in lieu of a postmarked envelope.

An important aspect of the framework for the review of arbitration awards is the provision of section 7122(b) that requires compliance with a final arbitration award. In conjunction with this provision of section 7122(b) is the provision of section 7116(a)(8) of the Statute making it an unfair labor practice for an agency to refuse to abide by a requirement of the Statute. As a result of these provisions, the Authority has addressed these obligations in three different types of cases where agencies have been charged with an unfair labor practice for failing to implement an arbitration award.

One type of case is where no exceptions, or no timely exceptions have been filed to the arbitration award. In this type of case, the Authority has held that the award became final and compliance with that award was required when the 30-day period for filing exceptions expired and that section 7122(b) precludes a challenge to the validity of the award in the ULP proceeding charging a refusal to implement the award. The Authority's position with respect to this type of case has been judicially upheld. AFLC, Wright-Patterson AFB, 15 FLRA 151 (1984), aff'd Air Force v. FLRA, 775 F.2d 727 (6th

Cir. 1985). These cases serve to emphasize the importance of timely invoking the review of the Authority by filing exceptions because even meritorious claims of illegality will be precluded in the ULP proceeding and court review of the ULP proceeding which will focus solely on whether or not there has been compliance with a final award of an arbitrator as required by section 7122(b).

The second type of case is where timely exceptions are filed and denied by the Authority. In this type of case the Authority has similarly held that the award became final and compliance was required when the exceptions were denied and that the Authority will not relitigate in the ULP proceeding the denial of the exceptions. What the agencies are actually attempting to do in this type of case is to obtain indirectly through the ULP case judicial review of the Authority's decision denying the exceptions, an attempt necessitated by the restrictive provisions as to direct judicial review of the Authority's decision resolving exceptions. The Authority's position with respect to this type of case has also been judicially upheld with the courts holding that the denial of the exceptions could not be relitigated in the context of the ULP proceeding by either the Authority or the court. U.S. Department of Justice v. FLRA, 792 F.2d 25 (2d Cir. 1986).

The third type of case where this obligation to comply with a final arbitration award has been addressed is where timely exceptions have been filed and are pending before the Authority but no stay of the arbitration award was requested under the provisions of the Authority's Rules and Regulations. In Soldiers' and Airmen's Home, 15 FLRA 139 (1984), the Authority notwithstanding the stay provisions of the Regulations held that when timely exceptions are filed, the award by definition is not final during the pendency of the exceptions and therefore compliance is not required under section 7122(b). That decision was vacated and remanded by the court in AFGE Local 3090 v. FLRA, 777 F.2d 751 (D.C. Cir. 1985). The court essentially concluded that the interpretation of section 7122(b) in this type of situation was ambiguous. Thus, the court determined that the Authority's interpretation was a permissible one, but that a contrary construction, that absent some sort of stay the award even during the pendency of exceptions must be complied with, was also a permissible interpretation of section 7122(b). Consequently, the court held that this permissible contrary construction must prevail so long as the Authority's Rules and Regulations contained provisions providing for a stay of arbitration awards when filing exceptions. The court advised that the Authority could not enforce the interpretation of section 7122(b) applied in Soldiers' and Airmen's Home, that an award was not final within the meaning of section 7122(b) during the pendency of exceptions, until such time as the stay provisions of the Authority's Rules had been withdrawn by rulemaking. As a result of the court's decision, the Authority revoked the provisions for requesting a stay of an arbitration award in conjunction with the filing exceptions. 52 Fed. Reg. 45754. The revocation of the stay provisions is intended by the Authority to permit it, consistent with the court decision, to interpret and enforce section 7122(b) of the statute to the effect that an arbitration award is not final and compliance is not required during the pendency of timely filed exceptions before the Authority.

The best explanation of the role of the Authority in actually reviewing arbitration awards is the language of section 7122(a) authorizing that review.

The introductory provision to section 7122(a) states that "[e]ither party to arbitration may file with the Authority an exception to any arbitrator's award." "Party" is defined in the Authority's Rules as any person who participated as a party in a matter where an award of an arbitrator was issued. What this means is that unless provided otherwise, only the union and the agency are entitled to file exceptions because they are the only parties to the arbitration proceeding. Therefore, in cases in which an exception was filed by the grievant, that exception was dismissed by the Authority because the grievant had not participated as a party in the proceedings before the arbitrator, and consequently the grievant was not entitled to file exceptions under section 7122(a).

The next important provision of section 7122(a) is the parenthetical to the introductory provision of either party filing exceptions with the parenthetical stating "other than an award relating to a matter described in section 7121(f)." Pursuant to this provision, arbitration awards relating to a matter described in section 7121(f) are not subject to review by the Authority and exceptions filed to such awards with the Authority have been and will be dismissed for lack of jurisdiction. The matters primarily described in section 7121(f) are those matters covered by section 4303 and section 7512 of the CSRA. The means of review of arbitration awards relating to these matters was discussed in § 6-3.b., *supra*.

The next provision of section 7122(a) provides the grounds for the Authority review of arbitration awards. This provision provides that the Authority will review an arbitration award to determine if it is deficient because it is contrary to any law, rule, or regulation or if it is deficient on other grounds similar to those applied by federal courts in private sector labor relations cases. However, before examining these grounds on which an arbitration award can be found deficient the context of Authority review needs to be recognized and acknowledged. Although Congress specifically provided for review of arbitration awards in section 7122(a), at the same time, Congress expressly made clear that the scope of that review is very limited. The Committee on Conference stated as follows in the Conference Report that accompanied the Bill that was enacted and signed into law.

The Authority will be authorized to review the award of an arbitrator on very narrow grounds similar to the scope of judicial review of an arbitrator's award in the private sector.

S. Rep. No. 95-1272, 95th Cong., 2d Sess. 153 (1978). Thus, the Authority's approach in resolving exceptions is to presume that the award should be accorded the binding status required by the Statute and only when it is expressly established that the award is deficient on one of the grounds specified in section 7122(a) will an award be vacated or modified by the Authority.

Section 7122(a)(1) specifies the grounds on which the most arbitration awards are asserted to be deficient and on which the most decisions finding an award deficient have been based. Thus, the most common exception is that the award is contrary to law or contrary to regulation and of the awards found deficient the most common basis has been that the award was contrary to law or contrary to regulation. In this respect the Authority has certainly indicated that an arbitrator in the federal sector cannot ignore the application of law and regulation. There is a framework of law and regulation governing many aspects of the employment relationship between federal employees and their employer -- the federal government. The arbitrator in the federal sector, unlike the arbitrator in the private sector, ordinarily cannot limit consideration solely to the collective bargaining agreement. The federal sector arbitrator must turn to any provisions of law and regulation which govern the matter in dispute, in addition to the provisions of the parties' collective bargaining agreement.

As has been noted, the other grounds on which an arbitration award may be found deficient are generally stated in section 7122(a)(2) as those which are similar to grounds applied by federal courts in private sector labor relations cases. In regard to what are commonly termed the private sector grounds for review, the Authority has recognized 5 specific private sector grounds on which federal courts find arbitration awards deficient and consequently so will the Authority. The private sector grounds that have been recognized are the following:

1. The arbitrator failed to conduct a fair hearing.

The Authority has held that an arbitrator has considerable latitude in the conduct of the hearing and that a claim by a party that the arbitrator conducted a hearing in a manner that the party finds objectionable will not support an allegation that the arbitrator denied that party a fair hearing. *E.g., Social Security Administration*, 24 FLRA 959 (1986). An arbitrator's refusal to hear relevant and material evidence may constitute a denial of a fair hearing. However, the Authority and the courts have long recognized that liberal admission of testimony and evidence is the customary practice in arbitration. Therefore, the Authority has denied all exceptions claiming that the party was denied a fair hearing because the arbitrator admitted and considered certain evidence and testimony. *National Border Patrol Council*, 3 FLRA 401 (1980). Exceptions which merely assert but do not establish that the arbitrator improperly refused to consider certain evidence have also been denied. *Warner Robins Air Logistics Center*, 24 FLRA 968 (1986). Likewise, arguments that the arbitrator failed to give appropriate weight to particular evidence or testimony provide no basis for finding an award deficient. *International Trade Commission*, 13 FLRA 440 (1983). Similarly, unsubstantiated allegations that an arbitrator was biased have been denied. *Social Security Administration*, 24 FLRA 959 (1986).

2. The award is incomplete, ambiguous, or contradictory so as to make implementation of the award impossible.

The Authority has indicated that in order to find an award deficient on this ground, there must be a showing that the award is so unclear or uncertain in its meaning and effect that it cannot be implemented. Delaware National Guard, 5 FLRA 50 (1981). No appealing party has yet made this showing and consequently all such exceptions have been denied.

3. The arbitrator exceeded his or her authority.

The Authority has held that arbitrators exceed their authority if they resolve an issue that was not submitted by the parties for resolution. Veterans Administration, 24 FLRA 447 (1986). However, the Authority, like the federal courts, will accord an arbitrator's interpretation of a submission agreement and an arbitrator's formulation of issues to be decided the same substantial deference accorded an arbitrator's interpretation and application of a collective bargaining agreement. Housing and Urban Development, 24 FLRA 442 (1986).

The Authority has also determined that arbitrators exceed their authority by extending an award to cover employees outside the bargaining unit or by ordering an agency to take an action beyond its authority. Bureau of Indian Affairs, 25 FLRA 902 (1987); Immigration and Naturalization Service, 20 FLRA 391 (1985). The Authority has also ruled that arbitrators may exceed their authority by extending an award to cover employees who did not file grievances or whose union representatives did not file grievances on their behalf. National Center for Toxicological Research, 20 FLRA 692 (1985). However, the Authority has indicated that when a dispute concerns a management practice generally applicable to the entire bargaining unit, the arbitrator's authority is quite broad and relief may be appropriate which encompasses similarly situated employees. Los Angeles Air Force Station, 24 FLRA 516 (1986).

4. The award is based on a "nonfact."

The Authority will find an award deficient if the central fact underlying the arbitrator's award is concededly erroneous and in effect is a gross mistake of fact but for which a different result would have been reached. It must be shown that the alleged mistake concerned a fact that was objectively ascertainable, central to the result of the award, and indisputably erroneous, and it must be shown that but for the arbitrator's mistake, the arbitrator would have reached a different result. U.S. Army Missile Materiel Readiness Command, 2 FLRA 432 (1988). Under this stringent standard, only two awards have been found deficient. Headquarters San Antonio Air Logistics Center, 6 FLRA 292 (1981); U.S. Army Missile Command, 28 FLRA 953 (1986).

In San Antonio Air Logistics Center, 6 FLRA 292 (1981), the arbitrator denied the grievance because he found that the collective bargaining agreement of the unit involved had been superceded by a multi-unit agreement. However, on its face, the multi-unit agreement clearly and unequivocally excluded the bargaining unit in question,

and it was equally clear that the arbitrator's error in this regard was the central fact on which he based his denial of the grievance. Thus, the award was found deficient because the central fact underlying the award was concededly erroneous and in effect was a gross mistake of fact.

In U.S. Army Missile Command, 18 FLRA 374 (1985), the arbitrator determined that a requirement in the parties' 1979 collective bargaining agreement was applicable to a personnel selection action in 1978. However, because the agreement was not in effect at the time of the selection action, the arbitrator's finding that the agency violated the agreement was indisputably erroneous and it was equally clear that the arbitrator's error in this regard was the central finding on which he based his award. Thus, this award was also found deficient because the central fact underlying the award was concededly erroneous and in effect was a gross mistake of fact, but for which, a different result would have been reached.

Other than these two awards, no other arbitration awards have been found deficient on this ground. As to most of these exceptions, the Authority found that the contentions constituted nothing more than disagreement with the factual findings of the arbitrator and it is well established, and the Authority has continuously held, that mere disagreement with the arbitrator's findings of fact does not establish that the award was based on a nonfact and does not otherwise provide a basis on which the award may be found deficient under the Statute. E.g., IRS, 15 FLRA 461 (1984).

5. The award does not draw its essence from the collective bargaining agreement.

In recognizing the essence ground, the Authority explained that the test for essence has been variously described by federal courts as an award which cannot in any rational way be derived from the agreement; or as an award that is so unfounded in reason or fact, so unconnected with the wording and purposes of the collective bargaining agreement, so as to manifest an infidelity to the obligation of the arbitrator; or as an award that evidences a manifest disregard of the agreement; or as an award that on its face does not represent a plausible interpretation of the agreement. USAMIRCOM, 2 FLRA 432 (1980).

In OEA, 4 FLRA 98 (1980), the Authority found that a portion of the arbitrator's award had no rational basis in the collective bargaining agreement. The dispute in this case involved official time for labor relations for which the parties' agreement provided only two options. When as part of his award, the arbitrator fashioned a third category not provided by the agreement, the award was found deficient as manifesting a disregard of the parties' collective bargaining agreement.

Similarly, in VA Hospital, 19 FLRA 725 (1985), the Authority found the award deficient as failing to draw its essence from the collective bargaining agreement because the arbitrator subjected to grievance and arbitration the agency's decision on

an incentive award in manifest disregard of the parties agreement which expressly excluded such a matter from coverage by the negotiated grievance procedure.

All other exceptions contending that the award does not draw its essence from the agreement have been denied by the Authority. As to most of these exceptions, it was clear that the appealing party was actually disagreeing with the arbitrator's interpretation and application of the collective bargaining agreement or was disagreeing with the arbitrator's reasoning and conclusions, and it is well established and the Authority has repeatedly held that the arbitrator's interpretation and application of the collective bargaining agreement and the arbitrator's reasoning and conclusions are not subject to challenge. Thus, such assertions provide no basis on which to find an award deficient under the Statute. *E.g., NRC*, 12 FLRA 609 (1983).

6-23. Judicial Review.

In contrast to most other decisions of the Authority, the CSRA prescribes that the Authority's decision resolving exceptions to an arbitration award is generally not subject to judicial review. Specifically, under section 7123 these decisions are not subject to judicial review "unless the order involves an unfair labor practice." Although the meaning of this provision is not certain, the reason for generally excluding Authority decisions resolving exceptions to an arbitration award is clearly stated by Congress in the Conference Report that accompanied the bill that was enacted and signed into law as the CSRA. In this respect the Conference Report states as follows:

The conferees, in light of the limited nature of the Authority's review, determined that it would be inappropriate for there to be subsequent review by the court of appeals in such matters.

Consistent with this congressional intent, the courts have construed this provision narrowly. Specifically, the 4th, 9th, and 11th Circuits all have concluded that there was a lack of jurisdiction to consider a petition for review of such Authority decisions. Tonetti v. FLRA, 776 F.2d 929 (11th Cir. 1985); U.S. Marshals Service v. FLRA, 708 F.2d 1417 (9th Cir. 1983); AFGE Local 1923 v. FLRA, 675 F.2d 612 (4th Cir. 1982). For instance, in U.S. Marshals Service, the 9th Circuit was of the view that there is no jurisdiction unless an unfair labor practice is either an explicit or a necessary ground for the final order issued by the Authority. In particular, the court stated that there would be no jurisdiction in the common case where the collective bargaining agreement was the basis for the arbitration award and the Authority's review. The court explained that to grant judicial review whenever a collective bargaining agreement dispute can also be viewed as an unfair labor practice would give too little scope and effect to the arbitration process and to the final review function of the Authority, both of which Congress made a central part of the CSRA. The D.C. Circuit in consolidated cases found that it lacked jurisdiction in one case, but reviewed and remanded the other case. Overseas Education Association v. FLRA, 824 F.2d 61 (D.C. Cir. 1987). In both cases the court followed the narrow construction of section 7123 by the 9th Circuit in U.S. Marshals

Service, but determined in the one case that it had jurisdiction to review the decision of the Authority because an unfair labor practice was "involved" or "necessarily implicated."

6-24. Conclusion.

The labor counselor will be extensively involved with arbitration and, to a lesser extent, grievances. As a lawyer, trained in the art of advocacy, the labor counselor will present a well-organized case. However, he will ultimately fail if he is not familiar with labor-management relations and civilian personnel law. The only means of becoming knowledgeable in these two areas is to become intimately involved with the program as it is being implemented at the installation. This includes working closely with the personnel of the Civilian Personnel Office on a daily basis and reading the memoranda which address these areas that the office receives. Failure to learn the area of law and to develop this rapport with people in the Civilian Personnel Office may result in a loss of confidence in and credibility of the labor counselor.

SAMPLE

EXPEDITED ARBITRATION PROVISION

ARTICLE XV

Section 4. Arbitration

A. General Provisions (1) A request for arbitration shall be submitted within the specified time limit for appeal.

(2) No grievance may be appealed to arbitration except when timely notice of appeal is given in writing to the appropriate official of the Employer by the certified representative of the Union. Such representative shall be certified to appeal grievances by the National President of the Union to the Employer.

(3) All grievances appealed to arbitration will be placed on the appropriate pending arbitration list in the order in which appealed. The Employer, in consultation with the Union, will be responsible for maintaining appropriate dockets of grievances, as appealed, and for administrative functions necessary to assure efficient scheduling and hearing of cases by arbitrators at all levels.

(4) In order to avoid loss of available hearing time, back-up cases should be scheduled to be heard in the event of late settlement or withdrawal of grievances before hearing. In the event that either party withdraws a case less than five (5) days prior to the scheduled arbitration date, and the parties are unable to agree on scheduling another case on that date, the party withdrawing the case shall pay the full costs of the arbitrator for that date. In the event that the parties settle a case or either party withdraws a case five (5) or more days prior to the scheduled arbitration date, the backup case on the appropriate arbitration list shall be scheduled. If the parties settle a case less than five (5) days prior to the scheduled arbitration date and are unable to agree to schedule another case, the parties shall share the costs of the arbitrator for that date.

(5) Arbitration hearings normally will be held during working hours when practical. Employees whose attendance as witnesses is required at hearings during their regular working hours shall be on Employer time when appearing at the hearing, provided the time spent as a witness is part of the employee's regular working hours.

(6) All decisions of an arbitrator will be final and binding. All decisions of arbitrators shall be limited to the terms and provisions of this Agreement and in no event may the terms and provisions of this Agreement be altered, amended, or modified by an

arbitrator. Unless otherwise provided in this Article, all costs, fees, and expenses charged by an arbitrator will be shared equally by the parties.

(7) All arbitrators on the Regular Panels and the Expedited Panels shall serve for the term of this Agreement and shall continue to serve for six (6) months thereafter, unless the parties otherwise mutually agree.

(8) Arbitrators on the Regular and Expedited Panels shall be selected by agreement of the parties or by striking names.

(9) Any dispute as to arbitrability shall be submitted to the arbitrator and be determined by such arbitrator. The arbitrator's determination shall be final and binding.

B. Regular Arbitration (1) Three (3) separate lists of cases to be heard in arbitration shall be maintained: (a) one for all removal cases and cases involving suspensions for more than 14 days, (b) one for all cases referred to Expedited Arbitration, and (c) one for all other cases appealed to arbitration.

(2) Cases will be scheduled for arbitration in the order in which appealed, unless the Union and employer otherwise agree.

(3) Only discipline cases involving suspensions of 14 days or less and those other disputes as may be mutually determined by the parties shall be referred to Expedited Arbitration in accordance with Section C hereof.

(4) Cases referred to arbitration which involve removals or suspensions for more than 14 days, shall be scheduled for hearing at the earliest possible date in the order in which appealed by the particular Union involved.

(5) Normally, there will be no transcripts of arbitration hearings or filing of post-hearing briefs in cases heard in Regular arbitration, except either party at the hearing may request to file a post-hearing brief. However, each party may file a written statement setting forth its understanding of the facts and issues and its argument at the beginning of the hearing and also shall be given an adequate opportunity to present argument at the conclusion of the hearing.

(6) The arbitrator in any given case could render an award therein within thirty (30) days of the close of the record in the case.

C. Expedited Arbitration (1) The parties agree to continue the utilization of an expedited arbitration system for disciplinary cases of 14 days suspension or less which do not involve interpretation of the Agreement and for such other cases as the parties may mutually determine. This system may be utilized by agreement of the Union

involved through its President or designee and the Deputy Installation Commander, or designee. In any such case, the FMCS or AAA shall immediately notify the designated arbitrator. The designated arbitrator is that member of the Expedited Panel who, pursuant to a rotation system, is scheduled for the next arbitration hearing. Immediately upon such notification the designated arbitrator shall arrange a place and date for the hearing promptly but within a period of not more than ten (10) working days. If the designated arbitrator is not available to conduct a hearing within the ten (10) working days, the next panel member in rotation shall be notified until an available arbitrator is obtained.

(2) If either party concludes that the issues involved are of such complexity or significance as to warrant reference to the Regular Arbitration Panel, that party shall notify the other party of such reference at least twenty-four (24) hours prior to the scheduled time for the expedited arbitration.

(3) The hearing shall be conducted in accordance with the following:

- (a) the hearing shall be informal;
- (b) no briefs shall be filed or transcripts made;
- (c) there shall be no formal rule of evidence;
- (d) the hearing shall normally be completed within one day;
- (e) if the arbitrator or the parties mutually conclude at the hearing that the issues involved are of such complexity or significance as to warrant reference to the Regular Arbitration Panel, the case shall be referred to that panel; and
- (f) the arbitrator may issue a bench decision at the hearing but in any event shall render a decision within forty-eight (48) hours after conclusion of the hearing. Such decision shall be based on the record before the arbitrator and may include a brief written explanation of the basis for such conclusion. These decisions will not be cited as a precedent. The arbitrator's decision shall be final and binding. An arbitrator who issues a bench decision shall furnish a written copy of the award to the parties within forty-eight (48) hours of the close of the hearing.

(4) No decision by a member of the Expedited Panel in such a case shall be regarded as a precedent or be cited in any future proceeding, but otherwise will be a final and binding decision.

(5) The Expedited Arbitration Panel shall be developed by the parties with the aid of the American Arbitration Association and the Federal Mediation and Conciliation Service.

Section 5.

The provisions of this Article will become effective February 1, 1981. Grievances instituted prior to February 1, 1981, will be processed, including arbitration, under the Grievance-Arbitration Procedure set forth under Article XV of the 1979 Agreement.

SAMPLE
GRIEVANCE PROVISION

ARTICLE 6
GRIEVANCE PROCEDURE

SECTION 6.01: SCOPE AND COVERAGE

This Article shall constitute the sole and exclusive procedure available to the Employer, the Union, and the employees of the bargaining unit for the resolution of grievances subject to the control of the Employer applicable to any matter involving the interpretation, application, or violation of this Agreement or local supplements thereto, any matter involving working conditions, or any matter involving the interpretation and application of policies, regulations and practices of the Air Force, AFLC, and subordinate AFLC activities not specifically covered by this Agreement.

SECTION 6.02: EXCLUSIONS

The sole exclusions to this grievance procedure are as follows:

- a. Matters subject to a statutory appeal procedure, except as indicated in Article 5, Discipline.
- b. Nonselection for promotion from a group of properly ranked and certified candidates.
- c. Written notices of proposed disciplinary actions where such actions would be grievable under this Procedure when effectuated. This exclusion does not infringe upon an employee's right to obtain representation for assistance in preparing a response to such notices.
- d. Grievances filed by employees over alleged health and safety violations, where issues contained therein have been previously filed by those employees and/or adjudicated under the procedures set forth in 29 C.F.R. 1960 and applicable implementing regulations.
- e. Nonadoption of a suggestion or disapproval of a quality salary increase or performance award.
- f. Separation of probationers, trial period employees, and temporary hires.

g. An action terminating a temporary promotion within a maximum period of two years and returning the employee to the position from which he or she was temporarily promoted or to a position of like grade.

h. Actions or decisions taken under the Personnel Security Program.

i. IG Complaints. However, such complaints may serve as a substitute for the informal grievance, subject to time limits set forth herein. If the complaint is not resolved within 14 days of its submittal, the employee may pursue the unresolved grievance by submitting said grievance at Step 2 of this Procedure, subject to the time limits set forth herein, provided that the employee withdraws the IG complaint by written notification to the IG terminating the IG's involvement in the grievance. This shall not preclude an employee from pursuing a grievance at Step 2 of this Procedure, subject to the time limits therein, if the response from the IG is not satisfactory. The employee may be accompanied by a designated representative when using the IG complaint system.

SECTION 6.03: GRIEVABILITY/ARBITRABILITY DETERMINATIONS

The Employer agrees to furnish the Union a final written decision concerning the nongrievability or nonarbitrability of a grievance, within the time limits provided for the written decision in Step 3 of this procedure. If the grievance is alleged to be subject to statutory appeal procedures, except as modified by Article 5, Discipline, the decision shall expressly state that it is the activity's final decision in the matter. All disputes of grievability or arbitrability shall be referred to an arbitrator as a threshold issue of the grievance in accordance with Article 7, Arbitration. If the arbitrator determines that the issue is arbitrable, the arbitrator will hear the merits of the grievance.

SECTION 6.04: EXTENSIONS OF TIME LIMITS

Time limits in this Article may be extended by mutual agreement of the Employer and the Union. Mutual agreement must be in writing and signed by the activity Local Union President, or a designated representative, and the activity Labor Relations Officer, or a designated representative. Failure to respond or meet will permit the grievance to be elevated to the next step.

SECTION 6.05: UNION OBSERVER AT GRIEVANCES WHERE EMPLOYEES REPRESENT THEMSELVES

If a Unit employee presents a grievance directly to Management, without Union representation, for adjustment consistent with the terms of this Agreement, the Local shall be given an opportunity to have an observer present at any discussions of the grievance on official time if the observer would otherwise be in a duty status.

SECTION 6.06: PROTECTION FROM REPRISAL

The Employer and the Union agree that every effort will be made by Management and the aggrieved to settle grievances at the lowest possible level. Inasmuch as dissatisfaction and disagreements arise occasionally among people in any work situation, the filing of a grievance shall not be construed as reflecting unfavorably on an employee's good standing, performance, loyalty, or desirability to the organization.

SECTION 6.07: PROCEDURES FOR EMPLOYEE GRIEVANCES

The following procedure shall be exclusively used for the submission of employee grievances to the Employer under this Article.

a. Step 1. Informal Procedure. An employee of the bargaining unit desiring to file a grievance must first discuss the matter informally with his first level supervisor within twenty-one (21) calendar days of the date of the management action or occurrence giving rise to the grievance or reasonable awareness of such action or occurrence. Such informal grievances may be presented orally or in writing. If the grievance is present in writing, the STANDARD GRIEVANCE FORM, AFLC Form 913 (Appendix 3), will be used.

(1) An employee desiring to file an informal grievance may request the assistance of his Shop Steward in preparing and presenting the informal grievance. A grievant will inform his supervisor of the nature of his grievance and request the assistance of the Area Shop Steward so that arrangements may be made to informally discuss the grievance.

(2) Subject to the provisions of Article 4, Official Time, a grievant and the Shop Steward will be allowed a maximum of up to 60 minutes of official time, if otherwise in a duty status, in reasonable privacy and in the grievant's immediate work area, to prepare for the informal discussion of the grievance. The grievance shall then be discussed with the grievant, the Shop Steward, the first-level supervisor, and any other person(s) the supervisor believes necessary for resolution. However, if upon being informed of the nature of the grievance pursuant to paragraph (1) above, the first-level supervisor determines that it is not within his authority to resolve the matter, the supervisor shall make arrangements with the appropriate management official with requisite authority to informally discuss the grievance with the employee and his Shop Steward.

(3) The RECORD OF DISCUSSION OF INFORMAL GRIEVANCE, AFLC Form 912, (Appendix 2) furnished by the Shop Steward, shall be completed and signed at the informal discussion meeting with a copy to the supervisor.

(4) If the matter is not satisfactorily resolved at the informal discussion meeting, a final informal decision will be issued to the grievant by the first-level

supervisor (or other management official as appropriate) within 14 calendar days of the informal discussion. If the informal grievance was presented in writing on the Standard Grievance Form provided by the Employer, the informal decision will be in writing.

b. Step 2. Formal:

(1) If the informal discussion or decision at Step 1 fails to resolve the matter, the grievance may be processed by the employee or a representative designated by the Union, with the Directorate, Staff Office, Tenant Commander, (or, in the case of grievance filed by unit employees of HQ AFLC, to the Deputy Chief of Staff) or equivalent level of his/her organization. The grievance must be received by the Employer within 7 calendar days of the Step 1 decision. The STANDARD GRIEVANCE FORM, AFLC Form 913, provided by the Employer, with a copy of the RECORD OF DISCUSSION OF INFORMAL GRIEVANCE and a copy of the Step 1 decision, where applicable will be filed with the appropriate management official at this Step. Additional issues, as distinct from related and supporting authority for such issues, may not be raised at this Step unless first considered at the informal Step.

(2) Within 7 calendar days of receipt of the grievance, the parties will meet to discuss the matter.

(3) Within 10 calendar days of the date of that meeting, the designated management representative shall render his written decision on the grievance.

c. Step 3. Formal. If the Employer denies the grievance at Step 2, the grievant may appeal the decision to the Commander of the subordinate AFLC activity (for HQ AFLC, the 2750th ABW Commander). The grievance must be received by the servicing activity's Labor and Employee Relations Division within 10 calendar days of receipt of the Step 2 decision.

(1) The appeal must contain the grievance case file, decisions rendered at preceding steps of the grievance procedure and any rebuttal arguments. New issues not considered at preceding steps shall not be raised.

(2) The Commander or his designee may schedule a meeting with the grievant and the designated representative. Within 10 calendar days of the date of the meeting, or within 21 calendar days of the date the grievance was filed at Step 3, whichever occurs first, the Employer shall render a decision in writing to the grievant. Such decision shall constitute the Employer's final decision on the grievance for the purpose of invoking arbitration.

SECTION 6.08: UNION OR EMPLOYER GRIEVANCES AT ACTIVITY LEVEL

For grievances between the Employer and the Union at the activity level concerning the interpretation and/or application of this Agreement, and supplements thereto, the following procedures apply.

a. If the Employer is aggrieved at the subordinate activity level, its representative shall file a written grievance with the president of the Union local representing bargaining unit employees at that particular activity within 21 calendar days of the date of the act or awareness of the act causing said grievance. Representatives of the parties shall meet as soon as possible on a mutually agreeable date, but not later than 14 calendar days from the date of submission of the grievance, at the subordinate AFLC activity to discuss the matter. Within 14 calendar days of said meeting, the president of the resident AFGE Local shall render his decision, in writing, in the matter to the Commander of the subordinate AFLC activity. If such decision fails to resolve the matter, the Employer may invoke the procedures for activity level arbitration set forth in Article 7.

b. If the Union is aggrieved, the president of the resident activity AFGE Local shall submit the grievance in writing to the Commander of the activity within 21 calendar days of the act or awareness of the act causing the grievance. The Commander or his designee may schedule a meeting with the local Union president.

(1) Within 10 calendar days of the date of the meeting or within 21 calendar days of the date the grievance was received by the Commander, whichever comes first, the Commander shall render a written decision to the local Union.

(2) If the activity Commander's decision fails to resolve a grievance over the interpretation or application of a local supplement, the Union may submit the issue to arbitration in accordance with Article 7.

(3) If the activity Commander's decision fails to resolve the grievance over the interpretation or application of this Agreement, the Union may appeal the decision to HQ AFLC. Such appeal, including any appropriate documentation must be forwarded to the Chief, Labor Employee Relations Division, HQ AFLC, within 7 calendar days of receipt of the activity Commander's decision. New issues shall not be raised.

(4) HQ AFLC shall review the grievance and render a final decision within 14 calendar days of receipt. The parties may meet to discuss the grievance upon mutual agreement. Failure of the Employer to render a decision within the above time limits shall constitute a denial of the grievance. The Employer's final decision shall be forwarded to the local Union president, with a copy to the Council President. The local Union may invoke the procedures for arbitration upon receipt of the Employer's final decision as provided in Article 7, Arbitration.

SECTION 6.09: UNION OR EMPLOYER GRIEVANCES AT COMMAND LEVEL

Grievances between the Employer and the Union at the Command level over interpretation/application of this Agreement involving actions or decisions of the Employer's headquarters or the Union's Executive Officers shall be filed directly by the aggrieved party as follows:

- a. Within 30 calendar days of the incident or knowledge of the incident, the aggrieved party must file a written grievance with the party alleged to have violated this Agreement stating the basis for the grievance and including documentation, information, and correspondence.
- b. The parties, at either the command or the activity level, may meet informally to discuss and attempt to resolve the matter.
- c. Within 30 calendar days of the date of the initial grievance, the responding party shall issue the final decision in the matter. If the matter is not resolved the aggrieved party may invoke arbitration. Questions of grievability/arbitrability must be raised at this point. The President, AFLC Council of AFGE Locals or his designee, and the Chief, Labor/Employee Relations Division, HQ AFLC, are authorized to file and/or respond to grievances at the Command level for the Union and the Employer respectively.

SECTION 6.10: WITNESSES

Employees shall be made available as witnesses at any step and will not suffer loss of pay or charge to leave while they are serving in that capacity if otherwise in a duty status.

APPENDIX

5 U.S.C. § 7121 (as amended)

§ 7121. Grievance procedures

(a)(1) Except as provided in paragraph (2) of this subsection, any collective bargaining agreement shall provide procedures for the settlement of grievances, including questions of arbitrability. Except as provided in subsections (d), (e), and (g) of this section, the procedures shall be the exclusive **administrative** procedures for resolving grievances which fall within its coverage.

(2) Any collective bargaining agreement may exclude any matter from the application of the grievance procedures which are provided for in the agreement.

(b)(1) Any negotiated grievance procedure referred to in subsection (a) of this section shall--

- (A) be fair and simple,
- (B) provide for expeditious processing, and
- (C) include procedures that--

(i) assure an exclusive representative the right, in its own behalf or on behalf of any employee in the unit represented by the exclusive representative, to present and process grievances;

(ii) assure such an employee the right to present a grievance on the employee's own behalf, and assure the exclusive representative the right to be present during the grievance proceeding; and

(iii) provide that any grievance not satisfactorily settled under the negotiated grievance procedure shall be subject to binding arbitration which may be invoked by either the exclusive representative or the agency.

(2) (A) **The provisions of a negotiated grievance procedure providing for binding arbitration in accordance with paragraph (1)(C)(iii) shall, if or to the extent that an alleged prohibited personnel practice is involved, allow the arbitrator to order--**

(i) a stay of any personnel action in a manner similar to the manner described in section 1221(c) with respect to the Merit Systems Protection Board; and

(ii) the taking, by an agency, of any disciplinary action identified under section 1215(a)(3) that is otherwise within the authority of such agency to take.

(B) Any employee who is the subject of any disciplinary action ordered under subparagraph (A)(ii) may appeal such action to the same extent and in the same manner as if the agency had taken the disciplinary action absent arbitration.

(c) The preceding subsections of this section shall not apply with respect to any grievance concerning--

- (1) any claimed violation of subchapter III of chapter 73 of this title (relating to prohibited political activities);**
- (2) retirement, life insurance, or health insurance;**
- (3) a suspension or removal under section 7532 of this title;**
- (4) any examination, certification, or appointment; or**
- (5) the classification of any position which does not result in the reduction in grade or pay of an employee.**

(d) An aggrieved employee affected by a prohibited personnel practice under section 2302(b)(1) of this title which also falls under the coverage of the negotiated grievance procedure may raise the matter under a statutory procedure or the negotiated procedure, but not both. An employee shall be deemed to have exercised his option under this subsection to raise the matter under either a statutory procedure or the negotiated procedure at such time as the employee timely initiates an action under the applicable statutory procedure or timely files a grievance in writing, in accordance with the provisions of the parties' negotiated procedure, whichever event occurs first. Selection of the negotiated procedure in no manner prejudices the right of an aggrieved employee to request the Merit Systems Protection Board to review the final decision pursuant to section 7702 of this title in the case of any personnel action that could have been appealed to the Board, or, where applicable, to request the Equal Employment Opportunity Commission to review a final decision in any other matter involving a complaint of discrimination of the type prohibited by any law administered by the Equal Employment Opportunity Commission.

(e)(1) Matters covered under sections 4303 and 7512 of this title which also fall within the coverage of the negotiated grievance procedure may, in the discretion of the aggrieved employee, be raised either under

the appellate procedures of section 7701 of this title or under the negotiated grievance procedure, but not both. Similar matters which arise under other personnel systems applicable to employees covered by this chapter may, in the discretion of the aggrieved employee, be raised either under the appellate procedures, if any, applicable to those matters, or under the negotiated grievance procedure, but not both. An employee shall be deemed to have exercised his option under this subsection to raise a matter either under the applicable appellate procedures or under the negotiated grievance procedure at such time as the employee timely files a notice of appeal under the applicable appellate procedures or timely files a grievance in writing in accordance with the provisions of the parties' negotiated grievance procedure, whichever event occurs first.

(2) In matters covered under sections 4303 and 7512 of this title which have been raised under the negotiated grievance procedure in accordance with this section, an arbitrator shall be governed by section 7701(c)(1) of this title, as applicable.

(f) In matters covered under sections 4303 and 7512 of this title which have been raised under the negotiated grievance procedure in accordance with this section, section 7703 of this title pertaining to judicial review shall apply to the award of an arbitrator in the same manner and under the same conditions as if the matter had been decided by the Board. In matters similar to those covered under sections 4303 and 7512 of this title which arise under other personnel systems and which an aggrieved employee has raised under the negotiated grievance procedure, judicial review of an arbitrator's award may be obtained in the same manner and on the same basis as could be obtained of a final decision in such matters raised under applicable appellate procedures.

(g)(1) This subsection applies with respect to a prohibited personnel practice other than a prohibited personnel practice to which subsection (d) applies.

(2) An aggrieved employee affected by a prohibited personnel practice described in paragraph (1) may elect not more than one of the remedies described in paragraph (3) with respect thereto. For purposes of the preceding sentence, a determination as to whether a particular remedy has been elected shall be made as set forth under paragraph (4).

(3) The remedies described in this paragraph are as follows:

(A) An appeal to the Merit Systems Protection Board under section 7701.

(B) A negotiated grievance procedure under this section.

(C) Procedures for seeking corrective action under subchapters II and III of chapter 12

(4) For the purpose of this subsection, a person shall be considered to have elected--

(A) the remedy described in paragraph (3)(A) if such person has timely filed a notice of appeal under the applicable appellate procedures;

(B) the remedy described in paragraph (3)(B) if such person has timely filed a grievance in writing, in accordance with the provisions of the parties' negotiated procedure; or

(C) the remedy described in paragraph (3)(C) if such person has sought corrective action from the Office of Special Counsel by making an allegation under section 1214(a)(1).

CHAPTER 7

JUDICIAL REVIEW

7-1. Introduction.

Under section 7123(a) of the Statute, any person aggrieved by any final order of the Federal Labor Relations Authority, with two exceptions, may, during the 60-day period beginning on the date on which the order was issued, institute an action for judicial review of the Authority's order in the U.S. Court of Appeals in the circuit in which the person resides or transacts business, or in the U.S. Court of Appeals for the D.C. Circuit. Section 7123(a) excludes from judicial review orders under section 7112 of the Statute, which involve an appropriate unit determination, and orders under section 7122, which involve decisions resolving exceptions to arbitration awards, unless the order of the Authority under section 7122 involves an unfair labor practice. Consequently, an order of the Authority resolving exceptions to an arbitration award would be subject to judicial review when the Authority's order involves an unfair labor practice.

Concurrently, under section 7123(b), the Authority may petition an appropriate U.S. Court of Appeals for the enforcement of any of its orders, for appropriate temporary relief, or for a restraining order.

Parties may request the General Counsel of the Authority to seek appropriate temporary relief (including a restraining order) in a U.S. district court under section 7123(d). The General Counsel will initiate and prosecute injunction proceedings only on the approval of the Authority. A determination by the General Counsel not to seek approval of the Authority for temporary relief is final and may not be appealed to the Authority.

Upon the issuance of a complaint and when seeking such relief is approved by the Authority, a regional attorney of the Authority or other designated agent may petition any U.S. district court, within any district in which the unfair labor practice is alleged to have occurred or the respondent resides or transacts business, for appropriate temporary relief. Section 7123(d) directs that the district court shall not grant any temporary relief when it would interfere with the ability of the agency to carry out its essential functions, or when the Authority fails to establish probable cause that an unfair labor practice was committed.

7-2. Standard of Review.

The standard of review of the decisions of the Authority is narrow. *E.g., U.S. Naval Ordnance Station v. FLRA*, 818 F.2d 545, 547 (6th Cir. 1987). Section 7123(c) of the Statute provides that review of an order of the Authority shall be conducted on the record in accordance with the Administrative Procedures Act, 5 U.S.C. § 706. Section 706(2)(A)

of the Act requires the reviewing court to set aside agency action found to be "arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law."

The reviewing courts must, however, give deference to the decisions of the Authority. In Bureau of Alcohol, Tobacco and Firearms v. FLRA, 464 U.S. 89, 97 (1983), the U.S. Supreme Court noted that the Statute intends the Authority to develop specialized expertise in the field of labor relations and to use that expertise to give content to the principles and goals set forth in the Statute. Consequently, the Court ruled that the Authority is entitled to "considerable deference when it exercises its 'special function of applying the general provisions of the Statute to the complexities' of federal labor relations." *Id.* (citations omitted). Accordingly, reviewing courts recognize that in order to sustain the Authority's application of the Statute, the court does not need to find that the Authority's construction is the only reasonable one or that the Authority's result is the result that the court, itself, would have reached. Instead, the courts adopt the Authority's construction when it is reasonably defensible and there is no compelling indication of error. E.g., AFGE Local 3748 v. FLRA, 797 F.2d 612, 615 (8th Cir. 1986). The U.S. Court of Appeals for the D.C. Circuit specifically explained the constraints of judicial review as follows:

We are not members of Congress, with the power to rewrite the terms of a law which may have revealed infirmities in its implementation. Nor are we members of the FLRA, to whom Congress delegated the primary authority to fill in interpretative voids in the [Statute]. . . . [T]he dissent's main theme is that the Authority's interpretation should be reversed because it is not the best, or the most reasonable one. We view our task, in contrast, as simply deciding, whether, given the existence of competing considerations that might justify either interpretation, the Authority's interpretation is clearly contrary to statute or is an unreasonable one.

AFGE v. FLRA, 778 F.2d 850, 861 (D.C. Cir. 1985).

Thus, an interpretation of the Statute by the Authority, when reasonable and coherent, commands respect. The courts are not positioned to choose from plausible readings the interpretation the courts think best. Their task, instead, is to inquire whether the Authority's reading of the Statute is sufficiently plausible and reasonable to stand as governing law. E.g., AFGE Local 225 v. FLRA, 712 F.2d 640, 643-44 (D.C. Cir. 1983). A court is not to disturb the Authority's reasonable accommodation of conflicting policies that were committed to the Authority by the Statute. AFGE v. FLRA, 778 F.2d at 856.

At the same time, the Supreme Court in Bureau of Alcohol, Tobacco, and Firearms, 464 U.S. at 97, cautioned that deference due an expert tribunal "cannot be allowed to slip into a judicial inertia." Accordingly, the Court stated that while courts should uphold reasonable and defensible interpretations of an agency's enabling act, they must not "rubber-stamp . . . administrative decisions that they deem inconsistent with a statutory mandate or that frustrate the congressional policy underlying a statute." *Id.*

(citations omitted). The Court also advised that when an agency's decision is premised on an understanding of a specific congressional intent, the agency is engaging in the "quintessential judicial function of deciding what a statute means." *Id.* at 98 n.8. In such a case, the agency's interpretation may be influential, but it cannot bind a court. *Id.*

The standard of review accorded Authority decisions that involve an examination of law other than the Statute or regulations other than its own is generally broader than the standard of review accorded their decisions interpreting and applying the Statute. E.g., California National Guard v. FLRA, 697 F.2d 874, 879 (9th Cir. 1983). For example, one court has stated that the Authority is due "respect," but not "deference," when interpreting or applying statutes and regulations other than its own. Professional Airways System Specialists v. FLRA, 809 F.2d 855, 857 n.6 (D.C. Cir. 1987). However, deference has been granted the Authority's rulings involving the interpretation of law other than the Statute when the court perceived that the interpretation "bears directly on the 'complexities' of federal labor relations." Health and Human Services v. FLRA, 833 F.2d 1129, 1135 (4th Cir. 1987) (quoting Bureau of Alcohol, Tobacco, and Firearms, 464 U.S. at 97).

In sum, these pronouncements reaffirm the general principle that courts will give great weight to an interpretation of a statute by the agency entrusted with its administration. In other words, the courts will follow the construction of the Statute by the Authority unless there are compelling indications that it is wrong. E.g., NFFE Local 1745 v. FLRA, 828 F.2d 834, 838 (D.C. Cir. 1987).

7-3. Court Review of Issues Not Raised Before the Authority.

Section 7121(c) of the Statute provides that absent extraordinary circumstances, no objection which has not been urged before the Authority shall be considered by a reviewing court. The meaning of this provision has been explained as effectively designating the Authority as the sole factfinder and as the first-line decisionmaker, and designating the courts as reviewers. Treasury v. FLRA, 707 F.2d 574, 579-80 (D.C. Cir. 1983). Thus, in Treasury v. FLRA, the court ruled that it could not review issues that an agency never placed before the Authority. In the view of the court, such action would in large measure transfer the initial adjudicatory role Congress gave the Authority to the courts in clear departure from the statutory plan. *Id.*

The U.S. Supreme Court has explained that the plain language of section 7123(c) evidences an intent that the Authority shall pass on issues arising under the Statute and shall bring its expertise to bear on the resolution of those issues. Consequently, in EEOC v. FLRA, 476 U.S. 19 (1986), the Court dismissed a writ of certiorari as having been improvidently granted when the agency failed to excuse its failure to raise before the Authority the same principal objections it raised in its petition for certiorari.

7-4. Review of Specific Categories of Cases.

a. Decisions of the Authority Resolving Exceptions to Arbitration Awards.

Section 7123(a) excludes from judicial review orders under section 7122 of the Statute, which pertain to decisions resolving exceptions to arbitration awards, unless the order of the Authority under section 7122 involves an unfair labor practice. In other words, decisions of the Authority resolving exceptions to arbitration awards are only judicially reviewable when the decision involves an unfair labor practice. Consistent with the legislative history to the Statute, the courts have narrowly construed the provision for judicial review of Authority decisions in this area.

The Conference Report which accompanied the bill that was enacted and signed into law stated: "The conferees, in light of the limited nature of the Authority's review, determined that it would be inappropriate for there to be subsequent review by the court of appeals in such matters." Consistent with this congressional intent, the U.S. Courts of Appeals for the 4th, 9th, and 11th Circuits have all concluded that there was no jurisdiction to consider a petition for review of such Authority decisions. Tonetti v. FLRA, 776 F.2d 929 (11th Cir. 1985); U.S. Marshals Service v. FLRA, 708 F.2d 1417 (9th Cir. 1983); AFGE Local 1923 v. FLRA, 675 F.2d 612 (4th Cir. 1982). For instance, in U.S. Marshals Service, the 9th Circuit believed that there is no jurisdiction unless an unfair labor practice is either an explicit or a necessary ground for the final order issued by the Authority. In particular, the court stated that there would be no jurisdiction in the common case where the collective bargaining agreement is the basis for the arbitration award and the Authority's review. The court explained that to grant judicial review whenever a collective bargaining dispute can also be viewed as an unfair labor practice would give too little scope and effect to the arbitration process and to the final review function of the Authority, both of which Congress made a central part of the Statute. The D.C. Circuit, in consolidated cases, found that it lacked jurisdiction in one case, but reviewed and remanded the other case. Overseas Education Association v. FLRA, 824 F.2d 61 (D.C. Cir. 1987). In both cases, the court followed the narrow construction of section 7123 by the 9th Circuit in U.S. Marshals Service, but determined in the one case that it had jurisdiction to review the decision of the Authority because an unfair labor practice was involved or necessarily implicated.

The effect of this provision of section 7123 generally precluding judicial review has also been addressed in the context of judicial review of an Authority decision finding an unfair labor practice for refusing to comply with an arbitration award as to which exceptions to the award were denied by the Authority. In the unfair labor practice cases before the Authority, the Authority has held that the arbitration award became final and compliance was required when the exceptions to the arbitration award were denied; and that the Authority would not relitigate the denial in the unfair labor practice proceeding.

In such cases, the courts have likewise declined review of the underlying Authority decision denying exceptions. The courts have refused to attribute to Congress the intent

of allowing the courts to do indirectly what Congress specifically prevented courts from doing directly under section 7123(a). Department of Justice v. FLRA, 792 F.2d 25 (2d Cir. 1986). In DQJ v. FLRA, the court concluded that in order for judicial review to be available, the unfair labor practice must be part of the underlying controversy that was subject to arbitration and not some "after the fact" outgrowth of the refusal to abide by the arbitrator's award. 792 F.2d at 28. To the U.S. Court of Appeals for the 9th Circuit, this "roundabout way of obtaining appellate review of a nonreviewable arbitration award has little to commend it in terms of judicial economy" and "flies in the face of legislative intent." U.S. Marshals Service v. FLRA, 778 F.2d 1432, 1436 (9th Cir. 1985). In agreeing with the Authority's method of disposing of these cases, the court stated that it would review the award only to determine whether an unfair labor practice was committed by refusing to comply. *Id.* at 1437. A U.S. district court has reviewed an Authority decision resolving exceptions to an arbitration award on the ground that the Authority's decision deprived an employee of a property interest in violation of the Fifth Amendment due process clause. The U.S. Court of Appeals for the D.C. Circuit ruled that neither the Statute nor the legislative history to the Statute was sufficient to preclude judicial review of a constitutional claim in U.S. district court. Griffith v. FLRA, 842 F.2d 487 (D.C. Cir. 1988). Citing the case of Leedom v. Kyne, 358 U.S. 154 (1958), the court also indicated that judicial review would be available in U.S. district court where the Authority had acted in excess of its delegated powers and contrary to a specific provision of the Statute. The court explained, however, that the Leedom v. Kyne exception is intended to be of extremely limited scope and that the action is not one to review a decision of the Authority made within its jurisdiction. Rather, the action is one to strike down a decision of the Authority made in excess of its delegated powers.

b. Authority Decisions in Representation Proceedings.

In addition to the specific provision of section 7123(a) precluding judicial review of Authority determinations of appropriate units under section 7112 of the Statute, the U.S. Court of Appeals for the D.C. Circuit has held that Congress intended that Authority decisions in representation cases would not be reviewable because they were not final orders. Department of Justice v. FLRA, 727 F.2d 481 (D.C. Cir. 1984). Specifically, the court held that an Authority decision under section 7111 setting aside an election and directing another election was not final and consequently was not reviewable. The court concluded that Congress made it clear that the provisions of the Statute concerning court review of representation proceedings were based on established practices of the National Labor Relations Board. 727 F.2d at 492. In this respect, the court noted that NLRB orders directing elections have consistently been found not to be final. In addition, the court noted similar treatment by the courts of "any type of order by the Board during representation proceedings, which include the determination of an appropriate bargaining unit, the direction of an election, ruling on possible election objections, and the certification of a bargaining representative." *Id.* (citations omitted).

c. Decisions of the Federal Service Impasses Panel.

In Council of Prison Locals v. Brewer, 735 F.2d 1497 (D.C. Cir. 1984), the court affirmed the dismissal by the U.S. district court for lack of jurisdiction of an appeal from a decision of the Federal Services Impasses Panel. The court held that Congress clearly precluded direct judicial review of decisions and order of the Panel. The court explained that instead, Panel decisions and orders are reviewable through unfair labor practice proceedings for refusing to comply, first by the Authority and then by the courts in an appeal from the Authority's decision and order in an unfair labor practice case under section 7123 of the Statute. The court emphasized that in such an appeal, it may review the validity of the Panel decision and order as to which compliance was refused. 735 F.2d at 1500. The court indicated, however, that a U.S. district court may exercise Leedom v. Kyne jurisdiction to invalidate a Panel decision and order when the extraordinary circumstances required under Leedom are presented.

d. Authority Statements of Policy or Guidance.

In AFGE v. FLRA, 750 F.2d 143 (D.C. Cir. 1984), the court held that Authority issuances on general statements of policy or guidance were judicially reviewable under section 7123(a). The court determined that Authority's statement on policy or guidance was final and was encompassed by the term "order" as used in section 7123(a). The court also determined that the Authority's statement was ripe for review. The court concluded that the issue was solely one of law, and the impact of the Authority's statement on the union was definite and concrete.

e. Refusals by the General Counsel to Issue a Complaint.

In Turgeon v. FLRA, 677 F.2d 937 (D.C. Cir. 1982), the court held that Congress clearly intended the General Counsel of the Authority to have unreviewable discretion to decline to issue unfair labor practice complaints. The court noted that the legislative history to the Statute makes clear that the role and functions of the General Counsel were closely patterned after the General Counsel of the NLRB. In this respect, the court emphasized that it is clear under the National Labor Relations Act that a decision of the NLRB General Counsel declining to issue an unfair labor practice complaint is not a final order of the NLRB and consequently is not judicially reviewable. Thus, the court ruled that the General Counsel of the Authority must be accorded the same discretion with respect to the issuance of complaints as the NLRB General Counsel.

7-5. Temporary Relief in U.S. District Court.

As noted, section 7123(d) of the Statute authorizes the Authority to seek appropriate temporary relief (including a restraining order) in U.S. district court. The injunctive proceedings are initiated and prosecuted by the General Counsel only on the approval of the Authority. As noted by the court in U.S. v. PATCO, 653 F.2d 1134 (7th Cir. 1981), before relief can be sought, there must be an unfair labor practice charge filed

and there must be a determination to issue a complaint. Section 7123(d) directs that a court shall not grant any temporary relief if the Authority fails to establish probable cause to believe that an unfair labor practice is being committed. Section 7123(d) also directs that a court shall not grant any temporary relief if such relief will interfere with an agency's ability to carry out its essential functions.



APPENDIX A
DEPARTMENT OF THE ARMY
OFFICE OF THE JUDGE ADVOCATE GENERAL
WASHINGTON, D.C. 20310

REPLY TO
ATTENTION OF: DAJA-CP 1974/8342

15 JUL 1974

SUBJECT: The Army Lawyer as Counselor to the Civilian Personnel Officer

SEE DISTRIBUTION

1. In recent years, Army lawyers have continued to assume greater responsibility for providing legal services to the Civilian Personnel Officer and his personnel management specialists. The labor law curriculum at The Judge Advocate General's School and textual material made available to the field reflect acknowledgment of this responsibility. However, the growing sophistication of the civilian personnel system, the requirement for representation of management in adversary proceedings, and the current emphasis on the rights and benefits of employees and management require renewed emphasis on the need for competent legal support. The amendments to Executive Order 11491, Labor-Management Relations in the Federal Service, introduced the Department of Labor as a third party in management-employee relations and provided for hearings before Administrative Law Judges. These administrative tribunals require the introduction of evidence, cross-examination and the preparation of briefs on appeal. As in all formal adjudicative procedures, the preliminary or informal processes, which are critical to final resolution, can be successful only when a close working relationship has been established between the attorney and the personnel management specialist.

2. The need for an effective labor counselor at every installation is also made apparent by the present trend towards expanding the scope of bargaining and by placing greater authority for the labor relations program at the local level. In February 1974, The Director of Civilian Personnel, ODCS PER, at the worldwide Civilian Personnel Officer Conference, stressed the importance of utilizing the services provided by judge advocate offices. This was followed by a Labor Relations Bulletin #80 in July 1974 which outlined legal services available to the civilian personnel officer and his staff (Incl to Appendix).

DAJA-CP 1974/S342

SUBJECT: The Army Lawyer as Counselor to the Civilian Personnel Officer

3. In view of these developments and in order to be fully responsive to the needs of the military commander and his staff, an Army lawyer will be designated at each installation to provide comprehensive legal services to the civilian personnel officer and his personnel management specialists. The requirements for this labor counselor program are set forth in the appendix to this letter. While this will be an additional duty at most installations, it is expected that the Army lawyer selected for this specialization will have the necessary time to pursue professional training and to acquire the practical experience essential to providing competent legal services. Each staff judge advocate will give his support to this program by taking a personal interest in developing the professional qualifications of his labor counselor, by fostering a sound working relationship with the civilian personnel officer and his staff, and by working towards the establishment of an effective labor relations team at his installation.

1 Incl
Appendix
w/Incls


HAROLD E. PARKER
Major General, USA
Acting The Judge Advocate General

APPENDIX
JAG LABOR COUNSELOR PROGRAM

1. Designation of Labor Counselor. Designate one Army lawyer by letter order at each installation as principal counselor to the Civilian Personnel Officer and his staff. A second attorney will be designated as his alternate to insure continuity of services upon transfer of the principal counselor.

a. The attorney must have at least one year of experience as an Army lawyer and he will be expected to specialize in this area of law for practice in future assignments in the Corps.

b. An attorney with the qualifications listed below should be selected. If such an attorney is not available, the designated attorney should pursue these qualifications upon selection as labor counselor:

- (1) Attendance at one law school course in labor law.
- (2) Attendance at The Judge Advocate General's School Law of Federal Employment Course.
- (3) Attendance at one labor relations course presented by Office of the Deputy Chief of Staff for Personnel (ODCS-P), Department of the Army or the United States Civil Service Commission (USCSC).
- (4) Practical experience representing the command at hearings conducted by the United States Civilian Appellate Review Agency, the United States Civil Service Commission, or the Department of Labor.

c. The name, qualifications, and orders appointing the designated labor counselors will be furnished this headquarters: ATTN: DAJA-CP by 23 August 1974. A copy of the orders will be filed with the individual's personnel records in Personnel, Plans and Training Office, OTJAG.

2. Responsibilities. The JAG labor counselor will be expected to develop effective relations with the civilian personnel officer and his personnel management specialists in order to undertake the following responsibilities:

- a. Participate in the development and/or review of local policies and procedures for administration of the labor-management relations program.
- b. Participate in contacts with labor organizations, particularly when union attorneys are involved.
- c. Represent the activity in third party proceedings, including bargaining unit determinations and unfair labor practice complaints; prepare briefs in third party proceedings for submission to the Federal Labor Relations Council.
- d. Assist in resolution of grievances arising from the administration of labor agreements; represent the activity in grievance arbitration, including preparation of post-hearing briefs.
- e. Provide legal advice to the installation labor negotiation committee.
- f. Provide legal advice on the interpretation and application of negotiated labor agreements.
- g. Represent the command in hearings before USCSC.

b. Assist in conducting workshops and seminars designed to carry out the management training requirements outlined in CPR 200, Chapter 250.1.

3. Training and Education. In order to develop an effective labor relations team and to insure sound legal support, professional training must be a continuing consideration.

a. Attendance by Army lawyers at courses presented by ODCSPER, USCSC, and TJAG School should be scheduled. Similarly, arrangements may be made for attendance at TJAG School courses by personnel management specialists by coordinating with DAJA-CP. Army lawyers may arrange to attend ODCSPER and USCSC courses by coordinating with the local civilian personnel officer.

b. Workshops and seminars with personnel management specialists should be scheduled on a regular basis to study current installation labor relations problems and to review significant rulings and decisions of the Department of Labor. Members of the OTJAG staff will be available to assist in planning and presentation of initial workshops. Requests for such assistance should accompany report in 1c above.

c. The labor counselor should be available to discuss recent Department of Labor decisions in management training programs mentioned in 2h above.

d. Joint orientation visits should be scheduled to the regional or district offices of the USCSC and the Labor-Management Services Administration.

e. Participation by the labor counselor in programs sponsored by the local labor relations bar is encouraged.

f. Inquiries concerning graduate study in labor law should be addressed to PPSTO.

4. Law Library References. There is a critical need to develop library resources in order to practice in this area of law. While some references are available in the CPO office, labor counselors must have their own research materials.

a. Essential references:

(1) Administrative Law Handbook, DA Pam 27-71, October 1972 (Chapter 4) ^{7/1/75}

(2) CPR 700, Chapter 711. This regulation includes DA instructions; DoD Directive 1426.1, Labor-Management Relations in the Federal Government; and Executive Order 11491, as amended.

(3) FPM Supplement 711-1. This regulation contains rules, forms and functions of Department of Labor, including procedures to be followed at hearings before Administrative Law Judges.

(4) CPR 700, Chapter 751.1 - Discipline; CPR 751.3 - Reprimands. These regulations were forwarded to all Judge Advocate offices by letter on 21 November 1973.

(5) CPR 752-1, Adverse Actions. This regulation was also forwarded on 21 November 1973.

(6) CPR 771.C. DA Grievance and Appeals System. This appendix was forwarded to Judge Advocate offices on 3 April 1974.

(7) CPR 700, Chapter 713.B, Processing Complaints of Discrimination on Grounds of Race, Color, Religion, Sex or National Origin. This appendix was forwarded on 23 July 1973.

(3) Labor relations legal service. Prentice-Hall, Bureau of National Affairs, and Commerce Clearing House publish legal services which provide authoritative information on civilian personnel law and labor relations in the public sector, including the latest decisions of the Department of Labor. Illustratively, BNA's Government Employees Relations Report is published weekly and costs about \$228.00 per year. Local funds should be used to procure these services.

b. Inclosure to Appendix contains a list of references which should be available in all Army law libraries. Distribution of CPR's to Army legal offices, coordinated at DA, will begin summer, 1974.

5. Coordination of Third Party Proceedings. As the number of decisions by the Department of Labor continues to grow and precedents are set, the need for coordinating appearances at hearings, post-hearing briefs, and appeals for submission to the Federal Labor Relations Council becomes critical. Labor counselors should endeavor to inform DAIA-CP informally by letter or telephone upon initiation of proceedings when a hearing officer is involved. This includes hearings on bargaining unit determinations, unfair labor practice charges, and grievance arbitration. This coordination and discussion is intended to assist Army lawyers who have not practiced in this area of the law.



REPLY TO
ATTENTION OF

APPENDIX B
DEPARTMENT OF THE ARMY
OFFICE OF THE JUDGE ADVOCATE GENERAL
WASHINGTON, D.C. 20310

DAJA-ZX

07 JUL 1982

SUBJECT: The Labor Counselor - Policy Letter 82-5

ALL JUDGE ADVOCATES

1. The Labor Counselor Program provides judge advocates and civilian personnel officers a means for understanding and resolving civilian personnel and labor relations law problems and, of course, those arising from employment discrimination.
2. Each statutory administrative agency which deals with Federal labor/civilian personnel problems has its own special rules and regulations. Labor counselors must be cognizant of these differences when they represent management before the Merit Systems Protection Board, the Federal Labor Relations Authority, the Equal Employment Opportunity Commission, and other third party proceedings. Labor counselors must also be familiar with industrial labor relations laws and regulations so that they can effectively advise contracting officers regarding contractor labor disputes which affect government operations.
3. In view of the complex area of law with which the labor counselor must be familiar, I expect each Staff Judge Advocate to give renewed emphasis to the program. The need for an effective, well-trained labor counselor at every installation or activity is apparent. Sufficient library resources must be available to enable labor counselors to provide competent legal services.
4. The Labor Counselor Program will be an item of interest during Article 6, UCMJ inspections.

Hugh J. Clausen
HUGH J. CLAUSEN
Major General, USA
The Judge Advocate General



APPENDIX C

**DEPARTMENT OF THE ARMY
OFFICE OF THE JUDGE ADVOCATE GENERAL
WASHINGTON, DC 20310-2200**

REPLY TO
ATTENTION OF

DAJA-LC

23 September 1985

SUBJECT: The Labor Counselor Program - Policy Letter 85-3

STAFF AND COMMAND JUDGE ADVOCATES

1. Since its creation in 1974, the Army Labor Counselor Program has provided specialized legal services to commanders and civilian personnel offices in the fields of labor and civilian personnel law. Effective 8 July 1985, the Director of Civilian Personnel, HQDA, required Labor Counselor coordination on all adverse personnel actions under AR 690-700, Chapter 751.
2. The importance of this program demands our renewed emphasis as the number of labor and civilian personnel cases continues to grow. To meet the requirements of the Labor Counselor Program, we must ensure that:
 - a. We have a well-trained and aggressive Labor Counselor to support every civilian personnel office in the Army.
 - b. We provide necessary personnel and resources to meet legal requirements of AR 690-700, Chapter 751.
 - c. Each Labor Counselor has attended the TJAGSA Federal Labor Relations course, or equivalent training, before assuming the duties of Labor Counselor.
 - d. To the maximum extent possible, Labor Counselor assignments are stabilized to develop a strong relationship between the civilian personnel office and the Labor Counselor.
 - e. Whenever possible, an assistant Labor Counselor be appointed to enhance continuity.

Hugh Overholt

HUGH R. OVERHOLT
Major General, USA
The Judge Advocate General

